

9-1-1985

Delegation of Environmental Impact Statement Preparation: A Critique of NEPA's Enforcement

Robert P. Frank

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>



Part of the [Environmental Law Commons](#)

Recommended Citation

Robert P. Frank, *Delegation of Environmental Impact Statement Preparation: A Critique of NEPA's Enforcement*, 13 B.C. Env'tl. Aff. L. Rev. 79 (1985), <http://lawdigitalcommons.bc.edu/ealr/vol13/iss1/4>

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

DELEGATION OF ENVIRONMENTAL IMPACT STATEMENT PREPARATION: A CRITIQUE OF NEPA'S ENFORCEMENT

*Robert P. Frank**

*Delegation without standards short-circuits the lines of responsibility
that make the political process meaningful.¹*

Alexander Bickel

I. INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA) requires that the federal government file an environmental impact statement (EIS) whenever it takes an action "significantly affecting the quality of the human environment."² Designed to ensure that the federal government consider the environmental effect of proposed actions, the environmental impact statement is the central procedural requirement of NEPA. When the statute became law, however, it did not specify whether or not the federal agency filing the EIS could delegate the job of preparing the statement to a state or a private party. After five years of litigation had left the federal circuits divided, Congress amended NEPA in 1975 to allow EIS delegation to the states as long as an independent federal evaluation of the statement followed.³ Congress did not, however, state how a federal agency — or a court confronting a challenge to the delegation — could ensure that evaluation of the statement was adequate and the statement objectively prepared.

* Executive Editor, 1985–1986, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ Fine, *Rethinking the Nondelegation Doctrine*, 62 B.U.L. REV. 257, 257 (1982).

² National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982).

³ National Environmental Policy Act of 1969, § 102(2)(D), 42 U.S.C. § 4332(2)(D) (1982).

Because NEPA is a statute that seeks to ensure that the federal government consider the environmental impact of its actions before taking them, the problem delegation presents is crucial to the statute's enforcement. An EIS prepared by a state or a private party directs federal consideration of environmental impact to two activities: offering guidance on the statement as it is being prepared and evaluating the statement once it is prepared.

Before 1975, courts could prevent the complete delegation of the EIS and require instead that the federal agency filing the statement prepare it in final form. Congress' amendment to NEPA denied courts this opportunity by allowing complete delegation of EIS preparation. But the amendment has not resolved debate over EIS delegation. Uncertainty over the degree to which NEPA allows delegation remains. Yet its focus has now changed to one that centers on how to decide when the statute's requirements for delegation have been met. This article explores that debate, beginning with an examination of NEPA and its treatment before 1975, progressing to the current judicial attitude toward the amended NEPA, and concluding with suggestions on how to resolve the current impasse NEPA has reached.

II. THE GENESIS OF THE ENVIRONMENTAL IMPACT STATEMENT

When S. 1075,⁴ the bill that would become the National Environmental Policy Act of 1969 (NEPA),⁵ was first introduced in February of that year by Senator Henry Jackson,⁶ it contained neither a declaration of national environmental policy nor a requirement for an environmental impact statement (EIS).⁷ Both provisions resulted from the testimony of University of Indiana political science professor Dr. Lynton K. Caldwell before Senator Jackson's Committee on Interior and Insular Affairs.⁸ Congress needed to realize, Caldwell urged, that a meaningful national environmental policy "is not merely a statement of things hoped for . . . but a statement that

⁴ R. ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE: IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT 8 (1976).

⁵ National Environmental Policy Act of 1969, § 101 *et seq.*, 42 U.S.C. § 4321 *et seq.* (1982).

⁶ R. ANDREWS, *supra* note 4, at 8.

⁷ F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 5 (1973). Anderson also notes here that Senator Jackson omitted any declaration of national policy in S. 1075 despite earlier efforts "to enlist congressional support for such a policy." *Id.*

⁸ *Id.* at 6.

will compel or reinforce"⁹ a desired objective. Caldwell proposed that federal agencies be required to evaluate the effect of their actions on the environment.¹⁰ This evaluation eventually became known as the environmental impact statement.

Requiring an EIS for every federal action affecting the environment provided the action-forcing measure Caldwell saw as the center of any national environmental policy: it made concern for the environment a factor in federal decisions and forced federal agencies to act accordingly. Thus, NEPA's declaration of a national environmental policy is inextricably linked to the EIS requirement. The union has proved to be a fruitful one: the EIS requirement in NEPA generated "more cases than any other single environmental statute in the 1970s."¹¹

Although Caldwell had outlined the idea of the environmental impact statement, its appearance awaited the completion of a legislative process that enabled Congress to address the consequences of a national environmental policy. The fruit of this process, NEPA represented a departure from the traditional statutory approach to environmental protection because the statute did not seek, as previous ones had, to impose responsibilities on parts of the private sector.¹² Instead, NEPA imposed responsibilities on the federal government itself, recognizing government as a cause of environmental damage and mandating that future government action consider environmental concerns.¹³ This approach not only risked exposing the federal government to unforeseen liabilities, but also raised the question of how to require the federal government to weigh the environmental impact of every action it took.

At the same hearing in which the need for an action-forcing provision was first raised, Senator Jackson and Dr. Caldwell discussed just how the responsibilities NEPA sought to codify could be imposed on the federal government. Senator Jackson saw two possible approaches: the statute could "lay down a general requirement that would be applicable to all agencies that have responsibilities that affect the environment"¹⁴ or it could try an "agency by agency" approach.¹⁵ This second approach would have achieved the aims of

⁹ R. ANDREWS, *supra* note 4, at 177.

¹⁰ *Id.*

¹¹ LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* 11 (1982).

¹² *Id.* at 10.

¹³ *Id.*

¹⁴ F. ANDERSON, *supra* note 7, at 6.

¹⁵ *Id.*

NEPA by spreading the responsibilities throughout the federal bureaucracy, amending the statutes empowering each federal agency to act. NEPA would thus have become a series of amendments to existing laws rather than a wholly new, independent statute. Faced with the prospect of abandoning his initial efforts and proposing instead numerous and intricate amendments to existing federal laws, Senator Jackson decided that he wanted to avoid a recodification of all the statutes.¹⁶

Rejecting recodification, Senator Jackson sought a general requirement applicable throughout the federal government and amended S. 1075 in May, 1969 to require a "finding" by the responsible federal official concerning the probable environmental impacts of any major federal action.¹⁷ The "finding" Senator Jackson proposed did not require — as the EIS requirement eventually would — a detailed statement of the environmental impact a federal action might have.¹⁸ Nor did the finding proposal require consultation among the various federal agencies involved in an action — another requirement the EIS would impose.¹⁹ Yet, despite containing requirements significantly less stringent than those NEPA would eventually possess, Senator Jackson's finding proposal initially confronted amendments designed to frustrate, not strengthen, its intent.

When S. 1075 went to the House, Representative Wayne Aspinall successfully sought to amend the action-forcing provision which was Senator Jackson's finding requirement.²⁰ Representative Aspinall's amendment was a single sentence: "[N]othing in this Act shall increase, decrease, or change any responsibility or authority of any federal official or agency created by other provision of law."²¹ This sort of dentistry left Senator Jackson's bill toothless. In one sentence, Representative Aspinall had erased the action-forcing provision Senator Jackson sought, and ensured instead that the proposed NEPA could not force the federal government to do anything it was not already required to do. The Representative fundamentally disagreed with the Senator's rejection of recodification and stated bluntly that "if additional authority is needed and direction to existing agencies is needed, they should be provided by separate legislation."²²

¹⁶ R. ANDREWS, *supra* note 4, at 9.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 11-12.

²¹ *Id.* at 11.

²² *Id.*

The House adopted Representative Aspinall's amendment, and returned to the Senate a radically different S. 1075, along with a request that there be a conference to resolve the differences between what the Senate had submitted and what the House had returned.²³ On October 8, 1969, shortly after introducing the House's conference request to the Senate, Senator Jackson introduced an amendment to S. 1075.²⁴ The amendment Senator Jackson had proposed to the Senate diluted the legal force of the required finding "by requiring only a 'detailed statement' subject to interagency review rather than a formal 'finding'"²⁵ that could have given potential litigants a chance to question an agency's environmental determinations through resort to the Administrative Procedure Act.²⁶ However, Senator Jackson's change inadvertently strengthened NEPA's action-forcing provisions by "substituting mechanisms for *external* review and challenge in place of the administrative requirements that had been crippled by the Aspinall amendment."²⁷

Senator Jackson's amendment was not, however, a response to the amendments S. 1075 had undergone in the House. Senator Jackson's amendment to S. 1075 had been written while the bill was in the House. It represented a compromise between Senators Jackson and Muskie over the jurisdiction of different committees they chaired.²⁸ Under Senator Jackson's amendment, certain federal con-

²³ *Id.* at 12.

²⁴ *Id.*

²⁵ *Id.* at 13 (emphasis in original).

²⁶ Administrative Procedure Act § 1, 5 U.S.C. § 551 *et seq.* (1982). NEPA did not free government officials of the constraints of the Administrative Procedure Act, but its provisions for notice and comment did mean that the statute would involve federal agency decisions beyond those of the filing agency. Because several decisions were made simultaneously by various agencies, the standard of review was somewhat lower than that provided for by the Administrative Procedure Act.

While the level and scope of this review is a question each court is free to decide, NEPA is at least specific in requiring, at 42 U.S.C. § 4332(2)(C), all federal officials responsible for the EIS to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." See National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(C); II GRAD, TREATISE ON ENVIRONMENTAL LAW, § 8.03[3][c].

²⁷ R. ANDREWS, *supra* note 4, at 13 (emphasis in original).

²⁸ Senator Muskie's Subcommittee on Air and Water Pollution, part of the Senate Committee on Public Works, and Senator Jackson's Committee on Interior and Insular Affairs disagreed about which committee would exercise jurisdiction over air and water standards. Senator Muskie received Senator Jackson's assurance that air and water standards set by his committee would not be affected by Senator Jackson's work on NEPA. Initially, this concession raised the question of whether or not environmental protection agencies themselves were required to prepare the EIS. See F. ANDERSON, *supra* note 7, at 7-8.

While this compromise has not *directly* affected EIS preparation, it nevertheless influenced EIS delegation. Once air and water standards were excluded from consideration under NEPA,

siderations of water and air quality were exempted from NEPA,²⁹ and the finding requirement became a requirement for a "detailed statement" of the environmental effects of the proposed federal action.³⁰ Popularly referred to as an environmental impact statement, Senator Jackson's "detailed statement" requirement was adopted when the House and Senate passed NEPA in December, 1969.³¹ President Nixon signed the bill into law on January 1, 1970.³²

This article explores the question of how courts may decide whether a federal agency has actually made the federal evaluation of environmental impact NEPA requires, after having delegated the job of EIS preparation to a state or private party. NEPA as passed by Congress did not even address this question; in fact, it was initially unclear if NEPA allowed EIS delegation at all. The first section of this article sets forth what NEPA now says about delegation — the statute allows it; and then outlines the current regulations dealing with the unbiased preparation of a delegated EIS. The second section shows how the early EIS delegation cases raised and sharpened issues NEPA had not addressed when enacted. This section examines how Congress responded to these cases when it amended NEPA in 1975 to allow delegation. It then analyzes how post-1975 delegation cases expanded delegation as courts attempted to interpret the delegation standards Congress did enact into law. The section concludes that the current confusion surrounding EIS delegation offers a textbook example of how courts struggle to reconcile the necessity of deference to agency decisions with the need to police delegation. The article's final section notes how courts may make use of recent regulatory developments to improve the judicial evaluation of the validity of EIS delegation.

III. NEPA AND EIS DELEGATION: THE STATUTORY CONTEXT

Since the question of EIS delegation involves an array of statutes, regulations, and case law, it is necessary at the outset to specify what NEPA, and the regulations promulgated under it, explicitly say about federal evaluation of delegated statements. NEPA's dec-

highway construction became the focus of much litigation involving EIS delegation. *See infra* notes 80–81 and accompanying text. This development had a powerful political effect on the law of EIS delegation. *See infra* notes 142–43 and accompanying text.

²⁹ R. ANDREWS, *supra* note 4, at 13.

³⁰ *Id.* at 12.

³¹ *Id.* at 13.

³² *Id.*

laration of national environmental policy is exceptionally broad. It provides that the federal government, working with state and local governments, as well as private organizations, is to "use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."³³ The public policy expressed in NEPA is thus by no means specific.

To realize this broad policy, NEPA imposes a general mandate on the federal government through the environmental impact statement requirement. The EIS requirement states that, before "major Federal actions significantly affecting the quality of the human environment" may be taken, the official responsible for such an action must file "a detailed statement" on its environmental impact.³⁴ This statement must discuss alternatives to the proposed action, as well as the impact of that action.³⁵

Though the responsible federal official must file the statement, that official need not prepare the statement. NEPA allows federal agencies to delegate the job of preparing the EIS.³⁶ Under a 1975 amendment to NEPA, state agencies and officials may prepare an EIS if two conditions are met. First, the state officials preparing the statement must have statewide jurisdiction and authority to grant the federal funds that trigger the statement.³⁷ Second, the federal official filing the statement must furnish guidance during its preparation and independently evaluate the EIS before adopting it.³⁸ Having satisfied these two conditions, the federal official faces a third requirement applicable to all environmental impact statements. Before an EIS may be filed, the federal official must "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental

³³ National Environmental Policy Act of 1969, § 101, 42 U.S.C. § 4331 (1982).

³⁴ National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982).

³⁵ *Id.* at (2)(C)(i), (ii), and (iii) (1982).

³⁶ National Environmental Policy Act of 1969, § 102(2)(D), 42 U.S.C. § 4332(2)(D) (1982).

³⁷ National Environmental Policy Act of 1969, § 102(2)(D)(i), 42 U.S.C. § 4332(2)(D)(i) (1982).

³⁸ National Environmental Policy Act of 1969, § 102(2)(D)(ii) and (iii), 42 U.S.C. § 4332(2)(D)(ii) and (iii) (1982). Though the statute lists three conditions applicable to any delegation of environmental impact statement preparation, there are only two listed here because in practice, (ii) and (iii) inevitably turn out to be different sides of the same coin. No court has ever sought to distinguish them, or to apply different standards to them.

impact involved.”³⁹ In effect, then, federal officials must circulate a draft EIS for comment before filing the statement required by NEPA.

Once federal officials have followed these procedures, the requirements set forth in NEPA are satisfied. The statutory terms of the EIS requirement impose no further procedures on the federal government. NEPA does not provide that agencies are bound by the environmental information they find. Nor does the statute require that the filing agency itself gather the information it must evaluate when making a decision. As enacted, NEPA was silent as to whether an agency could rely on information it had not gathered. The 1975 amendment resolves this question by allowing EIS delegation to the states; however, it is still unclear when a federal agency’s reliance on information it did not prepare constitutes a review sufficient to meet NEPA’s aims. This problem is the central problem EIS delegation continues to pose.

Because NEPA does not establish any one agency to prepare or file an environmental impact statement, no set of delegation standards has emerged, and the federal courts are continuously confronted with the problem of delegation. The courts are not, however, the only branch of government interpreting NEPA. The statute creates, in the Executive Office of the President, the Council on Environmental Quality (CEQ).⁴⁰ While the CEQ neither prepares nor files environmental impact statements, it promulgates regulations “to tell agencies what they must do to comply with the procedures and achieve the goals of the Act [NEPA].”⁴¹ CEQ regulations prescribe how a federal agency is to decide the scope of a planned EIS.⁴² But only two CEQ regulations address the problem of how to detect biased EIS preparation once the scope of the statement has been determined.

The fortieth volume of the Code of Federal Regulations for 1984 contains these two regulations in sections 1503.4 and 1506.5(c). Once a draft has circulated, the first of these two regulations requires federal agencies to explain why comments received from other federal agencies do not warrant further response.⁴³ This regulation aims to ensure that an agency filing an EIS has adequately addressed every federal concern about the proposed action. The second regu-

³⁹ National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982).

⁴⁰ National Environmental Policy Act of 1969, § 201 *et seq.*, 42 U.S.C. § 4341 *et seq.* (1982).

⁴¹ 40 C.F.R. § 1500.1 (1984).

⁴² 40 C.F.R. § 1507.1 (1984).

⁴³ 40 C.F.R. § 1503.4(a)(5) (1984).

lation specifically aims "to avoid any conflict of interest."⁴⁴ It requires private contractors who prepare an EIS to execute a disclosure statement "specifying that they have no financial or other interest in the outcome of the project."⁴⁵ Federal officials both prepare the disclosure statement and retain responsibility for the scope and content of the delegated EIS.⁴⁶

Since these two CEQ regulations are the only regulations that address the problem of ensuring adequate federal evaluation of a delegated EIS, it is necessary to stress again that it is case law that offers the most considerable body of law on EIS delegation. The reasons for this development go beyond NEPA's refusal to establish a single agency to prepare and/or evaluate EISs. The CEQ has only recently gained the right to make rulings that bind federal agencies. Until 1979, the CEQ offered guidelines that agencies were urged to follow but entitled to ignore. For the first nine years of NEPA's enforcement, only the courts decided which procedures NEPA legally mandated. Six years after its passage, NEPA still posed so many unanswered questions that Justice Marshall, in *Kleppe v. Sierra Club*,⁴⁷ remarked that "this vaguely worded statute seems designed to serve as no more than a catalyst for the development of a 'common law' of NEPA"⁴⁸ Though each federal agency could promulgate regulations to satisfy NEPA after consulting with the CEQ,⁴⁹ until 1979 the binding administrative authority to ensure uniform EIS preparation did not exist. When the Supreme Court declared in *Andrus v. Sierra Club*⁵⁰ that the "CEQ's interpretation of NEPA is entitled to substantial deference,"⁵¹ the CEQ became the binding administrative authority interpreting NEPA.

CEQ regulations now offer courts help in determining whether or not a delegated EIS has been objectively evaluated. In short, the enforcement of EIS requirements no longer depends ultimately on judicial evaluation of the statement. But CEQ regulations have not resolved the delegation question, or made judicial evaluation of it a simple matter of checking to see if the federal agency has followed certain procedures. Instead the regulations have followed the lead

⁴⁴ 40 C.F.R. § 1506.5(c) (1984).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 427 U.S. 390 (1976).

⁴⁸ *Id.* at 421.

⁴⁹ National Environmental Policy Act of 1969, § 102(2)(A), 42 U.S.C. § 4332(2)(A) (1982).

⁵⁰ 442 U.S. 347 (1979).

⁵¹ *Id.* at 358.

courts initially gave them. An examination of the case law reveals the complexities of EIS delegation, as well as the need for improved CEQ regulation and judicial evaluation.

IV. GREENE COUNTY, IOWA CITIZENS, AND CONSERVATION SOCIETY

Renewed attention to pre-1975 NEPA cases defines what constitutes independent federal evaluation. These cases discuss the roots of the current law as well as its critique, much of which is still valid today. NEPA's 1975 amendment has not rendered irrelevant the reasoning behind the pre-1975 cases which sought to limit EIS delegation. These cases remain relevant because they rest upon a judicial restraint that is now especially appealing since courts cannot decide what independent federal evaluation entails. Courts that refused to allow complete EIS delegation also refused to enter the debate about what constitutes independent federal evaluation. Instead they simply required the federal agency to prepare — not simply just accept responsibility for — the final draft EIS.

Given the inconsistencies marring judicial review of federal evaluation since 1975, the pre-1975 restraint most courts showed in their limited evaluation of delegation appears increasingly attractive. The cases examined here shaped Congress' amendment of NEPA: that legacy remains their historical impact. The legal impact of these cases — what they reveal about the way courts approach delegation — has been overlooked. For this reason, the three approaches taken by pre-1975 courts need to be reexamined.

Early NEPA cases that addressed the delegation issue tended to split between two main approaches. These cases either banned the delegation of final EIS preparation to a state or private party,⁵² or allowed such delegation provided that the court felt federal review to be sufficient.⁵³ A third approach banned delegation entirely, at

⁵² Committee to Stop Route 7 v. Volpe, 346 F.Supp. 731 (D. Conn. 1972), *aff'd sub nom.* Citizens for Balanced Environment and Transportation v. Volpe, 503 F.2d 601 (2d Cir. 1974), *cert. denied*, 423 U.S. 870 (1975); Daly v. Volpe, 350 F.Supp. 252 (W.D. Wash. 1972); Northside Tenants' Rights Coalition v. Volpe, 346 F.Supp. 244 (E.D. Wis. 1972); Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972).

⁵³ Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Pizitz, Inc. v. Volpe, 2 ELR 20378 (M.D. Ala. 1972), *aff'd*, 461 F.2d 208 (5th Cir. 1972); National Forest Preservation Group v. Volpe, 352 F.Supp. 123 (D. Mont. 1972); Citizens for Mass Transit Against Freeways v. Brinegar, 357 F.Supp. 1269 (D. Ariz. 1973); Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973); Movement Against Destruction v. Volpe, 500 F.2d 870 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Finish Allatoona's Interstate Right v. Volpe, 355 F.Supp. 933 (N.D. Ga. 1973); I-291 Why? Association v. Burns, 372 F. Supp. 223, *aff'd*, 517 F.2d 1077 (2d Cir. 1975).

any stage of EIS preparation. Only one case adopted this approach, *Conservation Society of Southern Vermont v. Secretary of Transportation*.⁵⁴ It stands alone in both its ruling and its consequences: the case led Congress to amend NEPA in 1975 to allow delegation.

In NEPA's first five years, the leading case against delegation is *Greene County Planning Board v. Federal Power Commission*.⁵⁵ This case provides a rationale against delegation that is still applicable today, despite the fact that Congress nullified the court's holding in NEPA's 1975 amendment. It will be examined first here. Most of these cases concerned highway projects; the leading case is *Iowa Citizens for Environmental Quality v. Volpe*.⁵⁶ In 1974, the court there presciently phrased the delegation problem that NEPA faces today.

A. Greene County

The cases permitting EIS delegation are best understood when viewed in the context of *Greene County*, which prohibited such delegation. From the beginning of its judicial interpretation, the EIS was seen as a decisionmaking tool. *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*,⁵⁷ an early landmark NEPA case, made it clear that a good faith consideration of environmental concerns is necessary to satisfy the statute.⁵⁸ In short, the EIS has to help the federal agency make a decision justifiable, rather than to justify a decision already made. As Senator Jackson had written about NEPA — and as Judge Skelly Wright had noted in *Calvert Cliffs*'⁵⁹ — after NEPA every federal agency faces a mandate to consider the environmental consequences of its actions.⁶⁰ Against this background, in the first cases against delegation, courts adopted

F.Supp. 933 (N.D. Ga. 1973); *I-291 Why? Association v. Burns*, 372 F. Supp. 223, *aff'd*, 517 F.2d 1077 (2d Cir. 1975).

⁵⁴ 362 F.Supp. 627 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974), *affirmance vacated and remanded*, 423 U.S. 809 (1975), *rev'd*, 531 F.2d 637 (2d Cir. 1976).

⁵⁵ 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972).

⁵⁶ 487 F.2d 849 (8th Cir. 1973).

⁵⁷ 449 F.2d 1109 (D.C. Cir. 1971).

⁵⁸ *Id.* at 1113 n.5, 1114.

⁵⁹ *Id.* at 1113, nn. 5, 6.

⁶⁰ R. Andrews, *supra* note 4, at 1. Interestingly, Senator Jackson actually wrote, in a law review article Andrews excerpts here, that the mandate NEPA imposes on the government is not only the statute's "most important feature" but also its "least recognized" one. See Jackson, *Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073, 1079 (1970).

the uncompromising stance that, in order to satisfy NEPA, a federal agency could not rely on an EIS it did not prepare.⁶¹

No single case had framed the issues for debate until *Greene County Planning Board v. Federal Power Commission*.⁶² In that case, the court rejected the federal approval of a pumped storage power project because the Federal Power Commission (FPC) had used an EIS prepared by the Power Authority of the State of New York (PASNY) in lieu of its own.⁶³ Though the FPC argued that it need not prepare its own EIS until making a final decision on the power project,⁶⁴ the court found that such timing did not satisfy NEPA. Citing *Calvert Cliffs*,⁶⁵ the court in *Greene County* noted

⁶¹ The first case to address the extent to which a federal agency may delegate EIS preparation is *Goose Hollow Foothills League v. Romney*, 334 F.Supp. 877 (D. Or. 1971). The Department of Housing and Urban Development's funding for a proposed high-rise apartment complex was admitted by HUD to be a "major" federal project for the purposes of § 102(2)(C). *Id.* at 879. Thus, NEPA applied. Delegation became an issue only when the court found the federal reliance on private information too great to satisfy NEPA. Unlike future delegation cases, there had not yet been any pre-arranged EIS preparation by a private party for federal use.

After reviewing the agency's preliminary environmental impact statement, the court found that HUD's statement was "not the statement the statute demands." *Id.* at 880. Noting that the EIS had completely ignored the increase in traffic and population a high-rise would entail, the court stated bluntly that "the agency charged with environmental responsibility appears to have done virtually nothing except to take the promoter's worksheet at face value and endorse it without independent investigation." *Id.*

Ignoring obvious impacts and offering no evidence of independent investigation were the first two criteria used by courts to test the legitimacy of a federal agency's reliance on information it had not gathered. The court in *Goose Hollow*, however, did not ban delegation as a matter of law. It concluded merely that NEPA's requirement of a good-faith consideration of environmental factors precluded the federal government from relying on information prepared by the project's promoter.

The first case in which a federal agency was permitted to rely on information it did not prepare is *Sierra Club v. Hardin*, 325 F.Supp. 99 (D. Alaska 1971). In *Hardin*, the court applied NEPA retroactively and permitted the federal agency to rely upon privately gathered information. In that case, U.S. Plywood had gathered information relevant to its operation of a pulp mill in a national forest. *Id.* at 105. When the U.S. Forest Service sought to rely on this information as its own, the court found no evidence of bias in the impact statement and allowed its federal use despite its private preparation. *Id.* at 126-127.

The court, however, made it clear that it would not search for bias in cases in which the parties had notice of NEPA: "[n]othing in this opinion should be construed as implying that the procedures followed by the Forest Service in its efforts to comply with NEPA in this case will be found acceptable in the future under circumstances where it is fair to impute notice of the Act's provisions to all parties at or before the time a major federal project is conceived." *Id.* at 127.

Were it not for the injustice of retroactive application, the *Hardin* court implied that NEPA would not excuse a federal agency from gathering and evaluating its own information.

⁶² 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972).

⁶³ 455 F.2d at 418-19.

⁶⁴ *Id.*

⁶⁵ *Calvert Cliffs*, 449 F.2d at 1119, *cited in* *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412, 420 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972).

that NEPA "is a mandate to consider environmental values 'at every distinctive and comprehensive stage of the [agency's] process.' The primary and nondelegable responsibility for fulfilling that function lies with the Commission."⁶⁶ The court then issued the strongest condemnation of delegation the federal courts had yet made.

The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions.⁶⁷

Central to the court's stand against delegation is the suspicion that an EIS prepared by interested parties will invariably be self-serving,⁶⁸ and therefore unable to advocate the public interest, a requirement NEPA demands⁶⁹ and the Second Circuit⁷⁰ emphasized. Though requiring the EIS to be federally prepared before any initial decision is made may delay such needed projects as the power facility in *Greene County*, the court there found delay to be "a concomitant of the procedures prescribed by NEPA"⁷¹ and refused to let "the spectre of a power crisis"⁷² prevent environmental impact evaluation. The federal agency, then, needed to use its staff to gather information for the final EIS; neither the gathering of information, nor the responsibility for it, could be delegated.⁷³ While draft impact statements prepared by state entities could be referred to in consultation with another agency, researching and writing the final EIS remained the job of the federal agency.⁷⁴

The court in *Greene County* also extended the argument against delegation: it stopped a federal attempt to delegate EIS preparation to a state agency.⁷⁵ Previous delegation cases had involved private

⁶⁶ *Greene County*, 455 F.2d at 420 (citing, in part, Calvert Cliffs' Coordinating Commission v. Atomic Energy Commission, 449 F.2d 1109, 1119 (D.C. Cir. 1971)).

⁶⁷ *Greene County*, 455 F.2d at 420 (footnote omitted).

⁶⁸ *Id.*

⁶⁹ National Environmental Policy Act of 1969, § 101, 42 U.S.C. § 4331 (1982).

⁷⁰ *Greene County*, 455 F.2d at 419 (citing Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied sub nom.* Consolidated Edison Co. of N.Y. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966)).

⁷¹ *Greene County*, 455 F.2d at 422.

⁷² *Id.* at 422-23.

⁷³ *Id.* at 422.

⁷⁴ *Id.*

⁷⁵ *Greene County*, 455 F.2d at 420.

parties.⁷⁶ Before *Greene County*, courts had certified the lack of bias in the privately-prepared EIS before them.⁷⁷ Courts preventing delegation made no statement to the effect that *all* privately-prepared EISs were tainted with self-interest.⁷⁸ The court in *Greene County*, however, noted that state-prepared EISs would always suffer "the potential, if not the likelihood"⁷⁹ of self-interested statements.

B. Iowa Citizens

The *Greene County* court's position against delegation departed from previous delegation decisions in another way. *Greene County*, like other delegation cases, involved an attack on the validity of building and construction permits. In 1972, when *Greene County* was decided, the majority of environmental impact statements involved other types of projects. Nearly one-half of all EISs filed in the first two years of NEPA's existence concerned highways.⁸⁰ Accordingly, most NEPA litigation involved highway projects. The strongest opposition to the *Greene County* rationale against delegation came from these cases, and, in 1974, the approach Congress eventually took toward delegation emerged from one of them, *Iowa Citizens for Environmental Quality, Inc. v. Volpe*.⁸¹ The path to *Iowa Citizens*, however, is a winding one, bearing evidence of the judicial disagreement which marks the early handling of EIS delegation.

In the months following the decision in *Greene County*,⁸² a number of circuit courts, in decisions involving highways, ruled against federal delegation of EIS preparation to state entities.⁸³ These deci-

⁷⁶ *Goose Hollow* involved a private developer seeking to build a high-rise apartment. See *supra* note 61. *Hardin* involved a corporation seeking to operate a pulp mill. See *supra* note 61.

⁷⁷ *Hardin*, 325 F. Supp. at 126-27.

⁷⁸ *Goose Hollow*, 334 F. Supp. at 880.

⁷⁹ *Greene County*, 455 F.2d at 420.

⁸⁰ Comment, *The Preparation of Environmental Impact Statements by State Highway Commissions*, 58 IOWA L. REV. 1268, 1268 n.7.

⁸¹ 487 F.2d 849 (8th Cir. 1973).

⁸² *Greene County*, 455 F.2d at 412.

⁸³ These decisions, however, do not always follow the Second Circuit's approach in limiting delegation. In *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972), the court prevented the Department of Transportation and the Federal Highway Administration (FHWA) from relying on an environmental report prepared in one week by two Wisconsin state officials and released only one day before construction contracts for the highway were signed. *Id.* at 1033-34. The lack of consultation between state and federal officials, rather than suspicion of bias in the state-prepared EIS, was the basis for the court's invalidation of delegation.

Though the timing of the EIS' release and the signing of the construction contracts for the

sions, however, did not form the trend. Most highway cases involving disputes over EIS preparation concluded that federal delegation of EIS preparation was valid under certain conditions.⁸⁴

For example, *National Forest Preservation Group v. Volpe*⁸⁵ acknowledged *Greene County*'s concerns, but found to be valid the Federal Highway Administration (FHWA) delegation of responsibility for EIS preparation.⁸⁶ The FHWA delegation, accomplished through its Policy and Planning Memorandum 90-1 (PPM 90-1)⁸⁷ was proper because PPM 90-1 required the FHWA division office to indicate review and adoption of the state-prepared draft EIS by signing and dating the statement before releasing it.⁸⁸ The *National*

highway indicated improper federal evaluation in *Scherr*, when, ten years later, the FHWA approved funding for a New York City highway on the same day an EIS for the highway was released, the *Scherr* decision was not even mentioned. See *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983) and *infra* note 188 and accompanying text.

In *Daly v. Volpe*, 350 F.Supp. 252 (W.D. Wash. 1972), the court considered an EIS prepared by a state for the FHWA. The court invalidated it, but only because it found no evidence of any federal evaluation of the EIS. NEPA, the court stated in its criticism of FHWA review of the EIS, "contemplates more deliberation than the time required to use a rubber stamp." *Id.* at 259.

Only in two cases, *Committee to Stop Route 7 v. Volpe*, 346 F.Supp. 731 (D. Conn. 1972), and *Northside Tenants' Rights Coalition v. Volpe*, 346 F.Supp. 244 (E.D. Wis. 1972), did the courts follow the *Greene County* reasoning against delegation. Citing *Greene County*, the *Northside Tenants'* court stated that "NEPA's requirements attach to the federal agency, not to the recipient of federal aid, and it is the federal agency which must prepare the impact statement and balance the project's worth." 346 F. Supp. at 248. *Committee to Stop Route 7* followed the reasoning of *Greene County* most closely, finding "the very same danger of self-serving assumptions that concerned the Court in *Greene County* . . . [to be] present here," 346 F. Supp. at 741, and requiring the final EIS to be prepared by the federal official "as required by the plain wording of NEPA." *Id.*

⁸⁴ See *supra* note 53 for a partial listing of these cases.

⁸⁵ 352 F. Supp. 123 (D. Mont. 1972).

⁸⁶ *Id.* at 125.

⁸⁷ *Id.* The court in *National Forest Preservation Group* validated the very delegation procedures that the *Scherr v. Volpe*, *supra* note 83, court felt gave no guarantee of adequate federal review. Confronting agency decision-making conducted under the same procedures, the court in *Scherr v. Volpe* did not imply that following PPM 90-1 offered adequate federal review; it declared instead that the record was silent as to the basis upon which the agency made its determination that no impact statement was required. *Scherr v. Volpe*, 466 F.2d at 1032.

Though the agency decision in *Scherr* differed from that in *National Forest Preservation Group*, what is important to the development of the judicial attitude to delegation here is not the different outcome of the cases, but the reluctance of the courts to explain why procedures inadequate in one instance are adequate in another, virtually identical case. A similar problem is exemplified in the difference between the district and circuit courts' opinions in a single case, *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 362 F. Supp. 627 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974). See *infra* notes 122-27 and accompanying text.

⁸⁸ *National Forest Preservation Group*, 352 F. Supp. at 127.

Forest Preservation court agreed with *Greene County's* fear of a state's self-interested statements but did not imply — as *Greene County*⁸⁹ did — the inevitability of such self-interest. The court wrote that “[t]here is no indication in this case that the EIS prepared by the HA [Montana highway administration] is self-serving. It should not be presumed that states are not concerned with the environmental problems facing us all.”⁹⁰ The court in *National Forest Preservation* would neither examine the state's preparation nor judge the adequacy of the statement's federal evaluation. The FHWA official's dated signature alone satisfied the *National Forest Preservation* court that federal delegation of EIS preparation to a state agency did not violate NEPA.

Other courts that allowed EIS delegation required factual evidence that sufficient federal review had taken place to ensure against the state's purported self-interest. In *Iowa Citizens for Environmental Quality v. Volpe*,⁹¹ the circuit court did find proof that the requirement for federal participation had been met, noting that the federal agency had recommended changes in the state's EIS and provided new information in the final EIS.⁹² Unlike previous cases allowing delegation, the court in *Iowa Citizens* did not simply announce a standard and at once say it had been met. The court instead found support, in the evidence before it, for a finding of unbiased preparation. This finding was made in a situation analogous to *Greene County*.

In *Iowa Citizens*, the Iowa State Highway Commission had prepared a final EIS for the Federal Highway Administration (FHWA) to use in deciding whether or not to fund an interstate highway across tillable farmland.⁹³ Confronted with a situation in which the self-interest of the state was obvious, the *Iowa Citizens* court noted evidence that alternatives had been studied, and changes made in the state-prepared EIS following federal review.⁹⁴ Relying on this evidence, the court upheld the Iowa State Highway Commission's preparation of the EIS.⁹⁵ Thus, *Iowa Citizens* recognized the possibility of biased preparation, but did not let that possibility determine its holding. Unlike *Greene County*, *Iowa Citizens* did not let the fear

⁸⁹ *Greene County*, 455 F.2d at 420.

⁹⁰ *National Forest Preservation Group*, 352 F. Supp. at 127.

⁹¹ 487 F.2d 849 (8th Cir. 1973).

⁹² *Id.* at 854.

⁹³ *Id.* at 853.

⁹⁴ *Id.* at 854.

⁹⁵ *Id.* at 854-55.

of bias ban the delegation of a final EIS. Instead, the *Iowa Citizens* decision demonstrated that courts could find evidence to support a finding that a state-prepared EIS is unbiased.

The court in *Iowa Citizens* goes beyond the perfunctory validation of delegation that federal courts sometimes allow unthinkingly.⁹⁶ But this case apparently split the court on the question that became the center of debate once Congress allowed delegation to the states in 1975: how are courts to decide when federal review of a state-prepared or privately-prepared EIS is sufficient to satisfy NEPA's demand that the federal government consider the effect of its actions on the environment?

Though the majority of the court in *Iowa Citizens* allowed delegation, the dissent by Judge Lay⁹⁷ foresaw great difficulty and contradiction in the attempt to judge the sufficiency of federal participation in EIS preparation.

. . . [T]here exists a fundamental difference between the responsibility for fact-gathering and making an independent objective appraisal of environmental impact as opposed to reviewing the self-serving declarations of a biased study by a state agency. *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412, 420 (2d Cir. 1972) Despite this difference, the majority opinion finds that there was substantial compliance with NEPA since the FHWA did not merely "rubber stamp" the state report but in fact required additional information to be added to the final statement. This overlooks the necessity and importance of federal preparation of the EIS *early* in the decisionmaking process. There exists no real prophylactic, late in the game, to overcome the possibility of a state's biased presentation of environmental factors.⁹⁸

In short, while the *Iowa Citizens* majority found evidence supporting sufficient federal review of a state-prepared EIS, Judge Lay's dissent concluded that, to use such evidence as the foundation for a

⁹⁶ In *Finish Allatoona's Interstate Right, Inc. v. Volpe*, 355 F.Supp. 933 (N.D. Ga. 1973), the court noted explicitly that "[t]he record is clear that the Secretary [of Transportation] did not merely rubber stamp the State's work, but rather reviewed, approved, and adopted the statement, thus making it his own." *Id.* at 938. The Tenth Circuit promptly adopted this language in *Citizens Environmental Council v. Volpe*, 484 F.2d 870, 875 (10th Cir. 1973).

Neither of these opinions contained explicit criteria designed to test the adequacy of the federal agency's review of the state-prepared EIS. They offered no guidance on how courts should address this problem. Instead, both *Finish Allatoona's Interstate Right* and *Citizens Environmental Council* simply announced a delegation standard of "objective review" and, without explanation, found that the standard had been met.

⁹⁷ *Iowa Citizens*, 487 F.2d at 855-68.

⁹⁸ *Id.* at 856.

rule of law that allowed delegation, raised the question of how to ensure NEPA's aims were met.⁹⁹

Ultimately, the standards applied in *Greene County* and *Iowa Citizens* do not differ as much as their outcomes. Each court looked for proof of impartial federal preparation of the EIS; they differed only over the amount of federal preparation an EIS needed to ensure that federal responsibilities under NEPA were met.¹⁰⁰ The essential disagreement between these cases does not lie in the standards they employ. It lies instead in the debate over how the standard for delegation — a requirement that the federal government demonstrate independent evaluation of the EIS — would be satisfied.

The common law treatment of this question had already started when Congress amended NEPA to allow delegation.¹⁰¹ Where *Greene County* bans delegation of the federal responsibility for a final EIS,¹⁰² *Iowa Citizens* allows that delegation, as long as evidence

⁹⁹ The rationale of *Iowa Citizens* appeared at least once before 1975 in a situation involving the delegation of EIS preparation to a private party. The issue in *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974), did not involve highways; it involved the construction of a airport runway. *Id.* at 464. But the court in *Life of the Land* nevertheless follows the rationale of *Iowa Citizens* to reach a result which *Iowa Citizens*, in its exclusive focus on the federal-state agency relationship, did not confront. Noting that "case law dealing with the delegation of EIS preparation has heretofore been limited to federal agency delegation to a state agency, and has permitted such delegation where the federal agency significantly participated in the participation of the EIS," *id.* at 468, the *Life of the Land* court approved an EIS jointly prepared by the State of Hawaii, the federal government, and a private consulting firm.

In doing so, the *Life of the Land* court became the first court to allow a financially-interested private party a role in the EIS. The court found "nothing . . . in either the wording of NEPA or the case law, which indicates that, as a matter of law, a firm with a financial interest in the project may not assist with the drafting of the EIS." *Id.* at 467. To defend this finding against charges of undiscovered bias, the court noted the Federal Aviation Administration (FAA) officials met routinely with state officials from the beginning of the statement's preparation, *id.* at 467, and that the FAA officials had "continued active examination" of the EIS once the statement was sent to Washington. *Id.*

The *Life of the Land* court did not, however, explore the content of the discussions during the routine meetings between the state officials, the FAA, and the private firm. Unlike *Iowa Citizens*, which had noted changes in the EIS, the court in *Life of the Land* noted only that such meetings had taken place, and did not attempt to see how — or if — they had influenced preparation of the EIS. Thus, if *Iowa Citizens* stands alone as the best example of how a court may judge a state-prepared EIS to be unbiased, then the *Life of the Land* decision illustrates how a court could construe virtually any federal-state contact to be evidence of sufficient federal review.

One other case upholding a federal-private delegation, *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974), viewed the federal agency much more suspiciously, remarking that even though private preparation of an EIS was not illegal, an agency's rubberstamping of it clearly was. 502 F.2d at 59. Public agencies cannot delegate their duties to private entities. *Id.*

¹⁰⁰ *Greene County*, 455 F.2d at 420; *Iowa Citizens*, 487 F.2d at 854.

¹⁰¹ National Environmental Policy Act of 1969, § 102(2)(D), 42 U.S.C. § 4332(2)(D) (1982).

¹⁰² *Greene County*, 455 F.2d at 420.

of federal evaluation of the EIS can be demonstrated.¹⁰³ It was over this point that the two sides of the delegation issue divided. *Greene County* and *Iowa Citizens* differ in their attempt to satisfy an identical standard, one that requires federal agencies to evaluate independently information they have not gathered. The agencies can do so, either by preparing the final EIS themselves, or by offering evidence that they have sufficiently reviewed an EIS prepared by a state.

*Conservation Society of Southern Vermont v. Secretary of Transportation*¹⁰⁴ rejected the approaches of both *Greene County* and *Iowa Citizens*. The court barred any degree of delegation, refusing to improve upon the standards for independent federal evaluation that both *Greene County* and *Iowa Citizens* had articulated in different ways.

C. Conservation Society

To understand how the congressional response to delegation has altered judicial consideration of it requires a review of *Conservation Society of Southern Vermont v. Secretary of Transportation*.¹⁰⁵ *Conservation Society*, like the cases supporting delegation, involved a dispute over federal funding of a highway.¹⁰⁶ However, unlike the other highway cases, the court in *Conservation Society* advanced a position against delegation so extreme that Congress overturned the court and amended NEPA to allow delegation of EIS preparation to state officials.¹⁰⁷ Seen in the light of *Greene County* and *Iowa Citizens*, *Conservation Society* becomes an amalgam of the approaches to delegation taken in each case.

The court in *Conservation Society*¹⁰⁸ unhesitantly expanded the *Greene County* court's suspicion of state bias, and declared that conflicts between federal and state interests were not only inevitable but intentional: "it is impossible for the Vermont Highway Department not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency."¹⁰⁹ But the court nevertheless embarked upon the search for independent federal evaluation that had characterized *Iowa Citizens*. In *Conserva-*

¹⁰³ *Iowa Citizens*, 487 F.2d at 854.

¹⁰⁴ 362 F. Supp. 627 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974), *affirmance vacated and remanded*, 423 U.S. 809 (1975), *rev'd*, 531 F.2d 637 (2d Cir. 1976).

¹⁰⁵ *Id.*

¹⁰⁶ *Conservation Society*, 508 F.2d 927 (2d Cir. 1974).

¹⁰⁷ National Environmental Policy Act of 1969, § 102(2)(D), 42 U.S.C. § 4332(2)(D)(1982).

¹⁰⁸ *Conservation Society*, 362 F. Supp. 627 (D. Vt. 1973).

¹⁰⁹ *Id.* at 631.

tion Society, this search led the court to conclude that "when the work [on the EIS] reached the final draft stage, the comments on it by the reviewing board were merely perfunctory, the equivalent of an agency rubber stamp."¹¹⁰ Concluding that it could find "no indication whatsoever that the FHWA or any of its employees conceived, wrote, or even edited any section of or passage in the EIS,"¹¹¹ the *Conservation Society* court held to be improper the FHWA filing of an EIS prepared by the Vermont Highway Department.¹¹² Despite the fact that the Vermont Highway Department had prepared the EIS under the same guidelines upheld in *National Forest Preservation Group v. Volpe*,¹¹³ the *Conservation Society* court refused to validate the result.

Confusion over the proper standard of delegation was further compounded by the court's inconsistent application of its own rule against biased EIS preparation. After proclaiming that states are necessarily biased, the *Conservation Society* court analyzed the facts in a way that disregarded their pronounced intolerance of bias. The court struck down the EIS, not because bias was present, but because it was present in unacceptable levels.¹¹⁴

In short, the court proceeded to judge the adequacy of federal evaluation of the EIS rather than to strike down the statement simply because the state had prepared it. Here, *Conservation Society* represents the federal judiciary's apparent inability to choose between *Greene County* and *Iowa Citizens* approaches to EIS delegation: the court voiced the former's suspicion of bias while applying the latter's standard to deal with its dangers. Predictably, then, the court in *Conservation Society* could inexplicably find bias in one place and not in another, despite the cases' factual similarities. After having declared all state agencies to be knowingly biased toward the accomplishment of their legislative mandate, the *Conservation Society* court then reasoned that the federal agency preparing the EIS could have "a mandate to achieve certain goals which conflict with the preservation of the environment."¹¹⁵ The question of why conflicting mandates are permissible at the federal level but are indications of "inherent bias"¹¹⁶ at the state level was left unanswered by the court.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 632.

¹¹² *Id.*

¹¹³ See *supra* note 85 and accompanying text.

¹¹⁴ *Conservation Society*, 362 F. Supp. at 633.

¹¹⁵ *Conservation Society*, 362 F. Supp. at 633.

¹¹⁶ *Id.*

The Second Circuit affirmed the lower court's ruling in *Conservation Society*,¹¹⁷ and adopted the view that states are invariably self-interested. For the first time, the Second Circuit interpreted *Greene County* to require completely federal EIS preparation.¹¹⁸ To support this view, the *Conservation Society* court quoted the CEQ guidelines then in effect, italicizing them for emphasis: "[i]n all cases, the agency should make its own evaluation of the environmental issues and take responsibility for the scope and content of draft and final environmental statements."¹¹⁹ Though the court viewed this rule as "strict adherence to the *Greene County* rule,"¹²⁰ it did not mention the possibility of permissible state EIS preparation on the draft level — participation that *Greene County* did allow.¹²¹

¹¹⁷ *Conservation Society*, 508 F.2d 927.

¹¹⁸ *Id.* at 932.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ The Second Circuit moved to correct the misreading of *Greene County* in *I-291 Why? Association v. Burns*, 517 F.2d 1077 (2d Cir. 1975).

In *I-291*, the court stressed that *Greene County* did allow state participation in the EIS process. The court in *I-291* upheld "the standard of primary and nondelegable responsibility placed on the federal agency . . . by NEPA," but refused the district court's interpretation of how *Greene County* would implement it. 517 F.2d at 1081 (discussing the district court's interpretation, 372 F.Supp. 223, 246 (D. Conn. 1974)). Instead, the *I-291* court noted that:

[O]ur holding is not meant to imply that we agree with the district court's characterization (at 372 F.Supp. 246 n.72) of our decision in *Green* [sic] *County Planning Board*, *supra*, as establishing a *per se* rule to the effect that state participation in the preparation of an EIS renders it invalid.

517 F.2d at 1081.

Although the circuit court's position in *I-291* is a retreat from *Greene County*, it is necessary to stress here that the *I-291* court was correct. The court in *Greene County* had never promoted an absolute ban on state participation in the EIS; it allowed that participation, restricting it to the draft level to ensure that the federal government made a decision apart from the state's interests. *Greene County*, 455 F.2d at 420.

Though *I-291* attracted no legislative attention when Congress amended NEPA in 1975, the case was decided in the same year, several months before NEPA's amendment, and almost certainly in response to the amendment's impending passage. By May 30, 1975, when *I-291* was decided, the actions that would lead Congress to amend the statute already had been taken. See *infra* notes 141-43.

In dispelling the notion that the court in *Greene County* banned all delegation, the *I-291* court acknowledged that certain circumstances could justify a measure of delegation and implicitly declared the courts capable of detecting these circumstances. This finding is an important one lest the differences between such cases as *Greene County* and *Iowa Citizens* be overestimated.

The court's comments in *I-291* regarding the *Greene County* decision illustrate that the judicial treatment of delegation in *Greene County* and in *Iowa Citizens* is not as different as the outcomes of each case might indicate. Before *Iowa Citizens* was even decided, the standard of independent federal investigation the case is now known for had been seen as part of *Greene County*. Not until much later did courts read *Greene County* as a case banning delegation. Originally, *Greene County* was viewed to impose upon federal agencies the duty to investigate

On appeal the *Conservation Society* court failed to explain why there was compelling reason to defer to CEQ guidelines when it had allowed the lower court to disregard the FHWA regulations. The Vermont Highway Department had acted pursuant to those regulations, and earlier cases had upheld them.¹²² Rather than explain such selective deference, the court simply asserted the importance of the CEQ guidelines, and ruled that requiring federal EIS preparation at both draft and final levels still allowed for sufficient *state* participation because the CEQ had confronted the dangers of duplicative work or unheeded suggestions.¹²³

It is contended that the FHWA is not involved in planning a particular project from the earliest stages, and thus does not have the advantages of information available to the state. This handicap is minimized, however, for the CEQ guidelines explicitly preserve sufficient flexibility for the federal agency to solicit and integrate information from state agencies.¹²⁴

In *Conservation Society* neither the district nor the circuit courts may be faulted for choosing between two opposing sets of procedures. The FHWA and the CEQ did give contradictory instructions to the persons preparing the EIS: the FHWA Policy and Procedure Memorandum 90-1 allowed state EIS participation on certain levels¹²⁵ while the CEQ regulation did not.¹²⁶ Though *Conservation Society* made a necessary choice between one standard and another, it failed to explain how the CEQ regulations would succeed where the FHWA regulations would fail. The circuit court's ruling in *Conservation Society* simply did not explain how its decision would insulate federal EIS preparation from state bias. Instead, the court declared that the federal official should take responsibility for the EIS; and future courts were left without any basis upon which to decide if federal officials had shouldered their burden. That omission seems ironic next to the *Conservation Society* court's clearly expressed conclusion regarding the central issue before it: the *Conservation Society* court recognized that it needed to "clarify definitively

independently. See Comment, *Environmental Impact Statements — A Duty of Independent Investigation by Federal Agencies*, 44 U. COLO. L. REV. 161 (1972).

¹²² See *supra* notes 87-90, 106 and accompanying text.

¹²³ *Conservation Society*, 508 F.2d at 932.

¹²⁴ *Id.* 40 C.F.R. § 1500.7(c) (1974) required the federal agency in all cases to be responsible for the scope and context of both the draft and the final EIS.

¹²⁵ See *supra* notes 85-87 and accompanying text.

¹²⁶ See *supra* note 118.

the respective roles of agency and court in effectuating the Congressional purposes."¹²⁷

The clarification sought by the court in *Conservation Society* was important not merely because the courts lacked a legal standard by which to judge the validity of federal EIS delegation to states and private parties. In *Conservation Society*, the court confronted the practical difficulties presented by EIS delegation. While *Greene County* feared the self-interest of the states, and *Iowa Citizens* sought to allay that fear by searching for independent federal EIS evaluation, *Conservation Society* also confronted a federal defendant that claimed it could not act without reliance on the supposed bias of state officials.¹²⁸ In response to the FHWA's argument that the fourteen employees it had in Vermont could not prepare as thorough an EIS as the Vermont Highway Department's hundreds of employees,¹²⁹ the *Conservation Society* district court wrote:

This is, however, an argument to take to Congress, seeking either more funds for the conduct of the federal agency operations, a change in NEPA to permit such delegation, or the simple authority to use its existing funds in the preliminary exploration of environmental impacts at the early stages of federal-state highway planning.¹³⁰

Once the Second Circuit specifically upheld the district court's decision,¹³¹ the most practical argument yet advanced for delegation¹³² was rejected. Congress, however, accepted *Conservation Society's* invitation to amend NEPA.

In the five years since NEPA's passage, then, courts had required, almost unanimously, that the federal agency filing an EIS independently evaluate all statements it did not prepare itself. Debate over *how* a federal agency could meet this standard led to *Greene County* and *Iowa Citizens*. Yet, until *Conservation Society*, no court had

¹²⁷ *Conservation Society*, 508 F.2d at 932.

¹²⁸ *Conservation Society*, 362 F. Supp. at 631-32.

¹²⁹ *Conservation Society*, 362 F. Supp. at 631-632.

¹³⁰ *Id.*

¹³¹ *Conservation Society*, 508 F.2d at 932 n.24.

¹³² The district court's opinion in *I-291* reveals the states' side of this same argument. 372 F. Supp. 223, 245-46 n.71 (D. Conn. 1974), *rev'd*, 517 F.2d 1077 (2d Cir. 1975). There, a Connecticut Department of Transportation official requested "that the role of environmental statement preparation be removed from the basic design team and placed in the hands of specialist personnel, properly qualified" The designer of a highway, the official continued, "cannot continue to be held responsible for the assembly and preparation of environmental statements without serious consequence." To continue to hold state officials responsible would be "asking too much." 372 F.Supp. at 245-46 n.71.

required exclusively federal EIS preparation. When the court in *Conservation Society* did so, Congress reacted with the only major amendment to NEPA since its passage.

V. THE 1975 AMENDMENT TO NEPA

Congress' amendment of NEPA invalidated the *per se* ban on delegation that *Conservation Society* made possible, and made delegation of EIS preparation to states legal under NEPA.¹³³ Under the statute,¹³⁴ federal delegation to the states was allowed if: the state agency preparing the EIS had statewide jurisdiction;¹³⁵ the federal official responsible for delegation furnished guidance in the EIS preparation;¹³⁶ independent federal evaluation was made prior to approval;¹³⁷ and certain notice provisions were met.¹³⁸ These conditions apply whenever EIS preparation is delegated to the states, but the amendment does not limit delegation to the states or to agencies having only statewide jurisdiction. Following the conditions outlined above, the amendment specifically provides that it "does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction."¹³⁹ In effect, then, the amendment allows delegation to local agencies but does not attempt to set standards for that delegation.

The amendment to NEPA resolves only one of the issues that prior cases raised: it legalized federal delegation of EIS preparation to the states. The amendment's second and third conditions for delegation are mere codifications of — not advancements beyond — the standards of *Greene County* and *Iowa Citizens*. The amended NEPA offers no assistance to courts in developing standards whereby the bias feared by the courts in *Greene County* could be avoided. The amendment, like the decisions in *Greene County* and *Iowa Citizens*, simply states in section 4332(2)(D)(ii) and (iii) that such bias *should* be avoided. The Senate Report noted that the

¹³³ National Environmental Policy Act of 1969, § 102(2)(D), 42 U.S.C. § 4332(2)(D) (1982).

¹³⁴ *Id.*

¹³⁵ *Id.* at § 4332(2)(D)(i) (1982).

¹³⁶ *Id.* at § 4332(2)(D)(ii) (1982).

¹³⁷ *Id.* at § 4332(2)(D)(iii) (1982).

¹³⁸ National Environmental Policy Act of 1969, § 102(2)(D)(iv), 42 U.S.C. § 4332(2)(D)(iv) (1982). The federal official must provide "early notification to, and [solicit] the views of, any other State or any Federal land management entity of any action or any alternative thereto" *Id.* This provision only applies to EISs involving the mandates of federal land management agencies.

¹³⁹ National Environmental Policy Act of 1969, § 102(2)(D), 42 U.S.C. § 4332(2)(D) (1982).

amendment "reflects procedures suggested in CEQ guidelines, several circuit court decisions, and agency regulations. Thus, in a sense its intent is to 'enact existing law.'"¹⁴⁰

Given the disagreement in the circuits over the proper standard for federal participation, the congressional action might appear to be a codification of confusion. But the concerns that moved Congress to write section 4332(2)(D), and the context in which the statute passed, suggest that the Congress did not want to face the most pressing legal issues raised by delegation while confronting a potentially explosive political situation. Shortly after the decision in *Conservation Society*, two other cases adopted its rationale and invalidated delegation.¹⁴¹ That neither of these cases were decided by the Second Circuit indicated that the rationale of *Conservation Society* was spreading. Contemporaneously, the FHWA ignored CEQ protests to the effect that only minor administrative changes were needed to meet *Conservation Society*, and ordered "an almost total halt"¹⁴² to all federally-funded highway projects within the Second Circuit's jurisdiction. The action further hurt a construction industry already suffering from recession, and sparked the first congressional proposals to overturn *Conservation Society*.¹⁴³

It was against this background that Congress began to examine *Conservation Society* and the judicial interpretation of NEPA, which, by 1975, was the common law of NEPA. The Senate Report on the proposed amendment to NEPA framed legislatively the issue raised in *Conservation Society* with a succinctness not duplicated by any court:

A vigorous debate has developed over the meaning and impact of the ruling — i.e., whether it permits substantial state preparation of a draft EIS as is suggested in the Council on Environmental Quality guidelines and the rulings in several other circuits, or whether it requires the Federal agency to prepare the EIS *ab initio*.¹⁴⁴

The same report continued to note that cases involving delegation continually confronted one issue: "the extent of permissible delegation of EIS preparation duties by the Federal agencies to consul-

¹⁴⁰ S. REP. NO. 94-152, 94th Cong., 2d Sess. 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 859, 866.

¹⁴¹ *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975); *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105 (D. N.H. 1975).

¹⁴² S. REP. NO. 94-152, *supra* note 140, at 860.

¹⁴³ *Id.* at 862.

¹⁴⁴ *Id.* at 859-60.

tants, state governments, other governmental units, or private applicants."¹⁴⁵ Despite the different outcomes of *Greene County* and *Iowa Citizens*, the Senate Report recognized that the element common to the major delegation cases was "the requirement for extensive Federal agency involvement in the preparation of environmental impact statements."¹⁴⁶ Congress needed to decide not the need for federal involvement, but its necessary extent.

Given this awareness of the task Congress faced, the statute as it was finally enacted is more notable for what it omits than for what it includes. In H.R. 3787,¹⁴⁷ an alternative version of H.R. 3130 (the bill Congress passed), Congress refused to delegate EIS preparation as broadly. H.R. 3787 restricted delegation to the three states of the Second Circuit and then only allowed delegation for highway projects.¹⁴⁸ Such restricted delegation recognized and responded to the problems raised by NEPA in the courts: highway cases had generated by far the largest number of cases allowing delegation.¹⁴⁹ Yet the Senate Report on the bill it passed inexplicably neglects to consider restricting provisions for EIS delegation to highway projects. Citing the adoption of the reasoning in *Conservation Society* by courts outside the Second Circuit,¹⁵⁰ the Senate Report rejects H.R. 3787's geographical limitations and says nothing about its legal limitations on delegation.¹⁵¹ Then, after having acknowledged that both courts and agencies had developed the same procedures approved in H.R. 3130,¹⁵² and that courts and agencies had often confronted the issue, the Senate Report neglects to discuss the problem of fixing responsibility for EIS delegation. Instead, the Senate Report simply asserts that the bill it supports provides "a uniform, national procedure."¹⁵³ As to just how H.R. 3130 — the bill that became the amendment to NEPA — provided this procedure, the Congress remained silent.

H.R. 3787, however, conflicted with H.R. 3130 in another way that goes to the heart of NEPA: it would confront the question of delegation not by amending NEPA, but by amending the federal-

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 861.

¹⁴⁷ *Id.* at 865.

¹⁴⁸ *Id.* at 864-65.

¹⁴⁹ See *supra* notes 80-81 and accompanying text.

¹⁵⁰ S. REP. NO. 94-152, *supra* note 140, at 860.

¹⁵¹ *Id.* at 865.

¹⁵² *Id.* at 864-65.

¹⁵³ *Id.* at 865.

aid highway law to allow delegation only in highway projects.¹⁵⁴ This approach was a step toward the recodifying, agency-by-agency approach that Senator Jackson and Professor Caldwell had discussed in the Senate hearings on NEPA.¹⁵⁵ Again, recodification was rejected. But this rejection of recodification, though recognizing the dangers the approach faced, avoided the specificity that the proposed recodification sought. The Senate Report merely stated that it is "firmly opposed to this method of amending NEPA indirectly through amendments to other laws or provisions in other legislation."¹⁵⁶

Though Congress refused to be any more specific than the courts had been already, the Senate Report discussed one answer to the question presented by delegation litigation. It was not, however, incorporated in the statute.

In order to avoid the danger . . . of constant judicial testing of whether the degree of delegation of EIS preparation duties is permissible or impermissible, the Committee strongly urges the affected Federal agencies to carefully document their guidance and participation in the preparation, and their independent review, of the EIS. In particular, the Committee wishes to emphasize the necessity of maintaining in each Federal agency, and fully using during the preparation and evaluation of the EIS's, a highly trained and interdisciplinary staff.¹⁵⁷

Congress never included in the statute an explicit requirement for careful documentation of the federal guidance and participation. Similarly, while rejecting recodification, the Congress neglected to require the interdisciplinary staff it claimed to value. Yet the Senate Report did not question testimony that "[i]n no case would H.R. 3130 permit delegation to any state agency lacking sufficient resources, personnel, and interdisciplinary expertise"¹⁵⁸ Despite acknowledging in the Senate Report that "[p]roper documentation and use of staff are the best means of reassuring whose [sic] who might level the 'rubber stamping' charge, or, should the charge be made, of disproving it,"¹⁵⁹ Congress did nothing to require either step.

¹⁵⁴ *Id.*

¹⁵⁵ See *supra* notes 14-16 and accompanying text.

¹⁵⁶ S. REP. NO. 94-152, *supra* note 140, at 865.

¹⁵⁷ *Id.* at 868.

¹⁵⁸ Statement by Russell W. Peterson, Chairman, Council on Environmental Quality, Before a Joint Meeting of the Senate Interior Committee and the Transportation Subcommittee of the Senate Public Works Committee on May 5, 1975, 94th Cong., 2d Sess., *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 871, 873.

¹⁵⁹ S. REP. NO. 94-152, *supra* note 140, at 868.

One further omission gave the statute yet another generality that promised to weaken NEPA in the years following the amendment's passage. While the Senate Report refused to consider H.R. 3787 because the bill specifically singled out the FHWA,¹⁶⁰ the same report stated that "H.R. 3130 is designed to affect one kind of agency action only."¹⁶¹ "That action, most typical of the Federal Highway Administration, involve[d] the granting of massive federal funding to a *statewide* agency, with a relatively minor substantive federal involvement."¹⁶² Congress, however, never placed such a limitation on EIS delegation in its amendment to NEPA. Furthermore, it was not until five more years — and more litigation — passed that a federal court limited the statute's application to the areas specified by the legislative history.¹⁶³ The decision in 1980, however, came too late to prevent the abuse of delegation that flowed from the congressionally sanctioned vagueness of the amendment to NEPA. In July, 1975, Congress enacted H.R. 3130 and amended NEPA.¹⁶⁴

As long as the federal agency sufficiently reviews the statement, the delegation of EIS preparation to state agencies is legal. Congress did not, however, seek to ensure that federal agencies would thoroughly review the statement, nor did it give courts guidelines for determining the adequacy of review. Nevertheless, faced with the lower court's declaration in *Conservation Society* that a state could not prepare an EIS, and Congress's later decision that it could, the Supreme Court vacated *Conservation Society* and remanded the case to the Second Circuit.¹⁶⁵ There, in *Conservation Society II*,¹⁶⁶ the court split along the same lines that courts before *Conservation Society I* had split — but the majority now supported delegation.¹⁶⁷

¹⁶⁰ *Id.* at 865.

¹⁶¹ *Id.* at 866.

¹⁶² *Id.*

¹⁶³ *Greenspon v. Federal Highway Administration*, 488 F.Supp. 1374 (D. Md. 1980).

¹⁶⁴ S. REP. NO. 94-152, *supra* note 140, at 859.

¹⁶⁵ *Conservation Society*, 423 U.S. 809 (1975).

¹⁶⁶ *Conservation Society*, 531 F.2d 637 (2d Cir. 1976).

¹⁶⁷ When the case was before the Second Circuit on remand from the Supreme Court, the *Conservation Society II* court split over the question of independent federal evaluation. Noting that the legislative history of 42 U.S.C. § 4332(2)(D) "makes it clear that the Congress intended to overturn our decision in *Conservation Society*," 531 F.2d at 639, the majority reversed their earlier ruling against delegation. In a *per curiam* opinion, they noted that verbal communication, meetings, EIS circulation and review had occurred between federal and state officials, and concluded "that there was compliance with the procedural requirements of Public Law No. 94-83 [42 U.S.C. § 4332(2)(D)]." *Id.*

Judge Adams' dissenting opinion exemplifies the unresolved debate that the generalities of NEPA's amendment failed to resolve. He noted that "the legislative purpose was to modify

This split foreshadowed a judicial reluctance to invalidate a legitimately delegated but insufficiently reviewed EIS.

VI. A WEAKENED NEPA: THE DELEGATION ISSUE AFTER 1975

Since 1975, when Congress answered the question of EIS authorship, courts have confronted an increasing array of delegation problems. The problem of federal-state delegation of EIS preparation has been compounded by the delegation of EIS preparation to private parties. As courts have answered questions raised by the amendment of NEPA's EIS requirement, they have also confronted the difficulty of reconciling their responsibility to guard against improper delegation with the legislature's explicit wish to permit delegation. In practice, this tension has left courts reluctant to insist upon any single standard for adequate federal review.

Given that no judicial standard has emerged and Congress has continued to be silent on the subject, only the Council on Environmental Quality has addressed the problem. In guidelines published in 1978, now binding as regulations on every federal agency,¹⁶⁸ the CEQ requires that private contractors preparing EISs sign disclosure statements "specifying that they have no financial or other interest in the outcome of the project."¹⁶⁹ While this regulation does much to prevent private parties from failing to meet responsibilities delegated to them, it does not address the state bias that originally created the delegation problem. Responding to that omission, courts are increasingly permissive in sanctioning delegation, upholding delegations no court before 1975 allowed.

This increasingly permissive standard can be explained by the two radically different ways delegation has developed. First, when Congress allowed federal agencies to delegate EIS preparation to the states, it did not make that responsibility nondelegable once the states received it.¹⁷⁰ As a result, states undertaking the job of EIS

and to clarify the rigid standard that Congress perceived the *Conservation Society I* court had established for federal involvement in the preparation and drafting of the environmental impact statement (EIS)." *Id.* at 640. Judge Adams wrote that "the degree of federal control mandated by the modified statute" had not been exercised in the case, based on the record before him. *Id.* But despite a lengthy examination of the NEPA amendment's legislative history, Judge Adams based his position against delegation on the very facts the majority had cited to support delegation. *Id.* at 641-44. Neither side could find in the modified NEPA any factual rationale for its decision.

¹⁶⁸ 40 C.F.R. § 1506.5 (1983).

¹⁶⁹ 40 C.F.R. § 1506.5(c) (1983).

¹⁷⁰ National Environmental Policy Act of 1969, § 102(2)(D), 42 U.S.C. § 4332(2)(D) is silent on the issue of state delegation of EIS preparation to private parties. The amendment,

preparation have delegated it to private parties, and consulting firms have begun to play a significant role in EIS preparation. This delegation has complicated the task of uncovering biased EIS preparation. It is, however, a delegation NEPA allows. The leading case in this area is *Sierra Club v. United States Army Corps of Engineers*.¹⁷¹

A. *Sierra Club v. United States Army Corps of Engineers and EIS Delegation*

The current judicial attitude toward an agency's delegation of EIS preparation has developed gradually. The first case to interpret the 1975 amendment's requirement that state-prepared EISs receive sufficient federal review was the Second Circuit's decision in *Conservation Society*.¹⁷² The trend since 1975 clearly favors delegation in a way neither *Greene County* nor *Iowa Citizens* would endorse. Courts, aware that Congress amended NEPA when the statute's requirements delayed highway construction, have not been inclined to accept delay as the price of enforcing NEPA. Where *Greene County*¹⁷³ had considered delay an acceptable cost of following NEPA and ordered a guarantee from the agency of non-biased EIS preparation, courts no longer accept delay and will uphold even an EIS prepared by private parties who have a financial interest in the project.¹⁷⁴ Courts have also allowed local agencies to participate in

however, provides that it "does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction." *Id.*

¹⁷¹ *Sierra Club v. United States Army Corps of Engineers*, 541 F. Supp. 1367 (S.D.N.Y. 1982), *partially aff'd, partially vacated*, 701 F.2d 1011 (2d Cir. 1983). The second way in which delegation has been shaped resurrects the recodification controversy surrounding NEPA's passage and raises political considerations beyond the scope of this article. This delegation goes outside NEPA altogether: regulations and statutes passed after NEPA now allow agencies acting under various statutes to delegate EIS preparation directly to private parties which then assume the entire responsibility for satisfying NEPA. This delegation frequently circumvents NEPA's aims and will be examined briefly to explain cases which have upheld EIS delegations incompatible with the statute.

One statute that permits delegation of NEPA responsibilities is the Federal Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.* (1982). For the legislative history of this delegation, see NOTIS-MCCONARTY, *Federal Accountability: Delegation of Responsibility by HUD Under NEPA*, 5 ENVTL. AFFAIRS 121 (1976). For the regulatory delegation of NEPA responsibilities, see *infra* notes 229-30 and accompanying text.

¹⁷² *Conservation Society*, 531 F.2d at 637.

¹⁷³ *Greene County*, 455 F.2d 412 (2d Cir. 1972).

¹⁷⁴ See, e.g., *Essex County Preservation Association v. Campbell*, 399 F. Supp. 208 (D. Mass. 1975), *rev'd*, 536 F.2d 956 (1st Cir. 1976), where the court upheld an EIS prepared by the same private consulting firm that Massachusetts had employed to serve as design engineer for the highway project in question. 536 F.2d at 960. Even though the district court had found that "there was considerable federal review, discussion and revision of the EIS" as the

EIS preparation. Courts will not view an EIS as inevitably biased if some of its preparation has been done by an agency with less than statewide jurisdiction.¹⁷⁵ Thus NEPA apparently does not limit the authority of the states to delegate EIS preparation once they have received the job.¹⁷⁶

Courts interpreting NEPA's amendment, then, have increased federal agencies' latitude with respect to the delegation of EIS preparation. Though they have done so in direct response to NEPA's

statement was being developed by the engineering firm, the EIS was invalidated on the grounds that it was biased. 399 F.Supp. at 214-15. The First Circuit reversed. The court held for the first time that an EIS is not improperly delegated to a private party when evidence of independent federal evaluation prior to the EIS approval is given. 536 F.2d at 960.

Since *Essex County*, courts have reaffirmed repeatedly the legality of private preparation of the EIS by a financially-interested party. See *Hart and Miller Islands Area Environmental Group v. United States Army Corps of Engineers*, 505 F. Supp. 732, 750 (D. Md. 1980) (participation of a project's design engineers in preparing an impact statement "does not necessarily fatally undermine the impact of the statement"); *No Oilport! v. Carter*, 520 F.Supp. 334, 353 (W.D. Wash. 1981) (dismissing arguments against private preparation of the EIS as "vague" and "unsupported" by the record); *Residents in Protest — I-35E v. Dole*, 583 F.Supp. 653 (D. Minn. 1984) (allowing the private preparer of an EIS to drop further mention of alternatives to the project in the final statement, even though the alternatives had been mentioned in the draft EIS).

¹⁷⁵ *Greenspon v. Federal Highway Administration*, 488 F. Supp. 1374 (D. Md. 1980), involved an EIS prepared for a highway project by the Interstate Division of Baltimore City, a joint city-state agency with jurisdiction only in Baltimore. *Id.* at 1376. The plaintiffs, who owned property that would be affected by the highway, protested federal use of this EIS. The court was then confronted with the confusion left by the NEPA amendment over the statute's failure to provide a distinction between a state official and a local one for the purposes of EIS preparation.

In *Greenspon*, the court noted that the amendment allowing delegation was not intended to cover local officials and agencies, but that its definitions of "[s]tate agency or official" were never clarified to ensure this exclusion. *Id.* To resolve the question, the court decided that NEPA's amendment applied to certain types of projects but not to others. Having considered the amendment's legislative history, the court held that the NEPA amendment applied "only where massive federal grants to statewide agencies are involved, with relatively minor federal involvement. A prime example is a federal highway grant." *Id.* at 1380. After the *Greenspon* decision, agencies are not subject to the conditions of NEPA's amendment when the agency receiving grants from the federal government has less than statewide jurisdiction. The *Greenspon* court thus allowed local agencies to prepare EISs, but did not opine as to which standards were to apply when the federal delegation led to EIS preparation by local agencies or private parties. Nevertheless, no one has questioned the *Greenspon* court's determination that NEPA's amendment does not preclude EIS preparation by local agencies or private parties.

The NEPA amendment itself does not limit the extent to which states may delegate EIS preparation to local agencies or private parties. Thus, although it involved a highway, the *Greenspon* holding places EIS delegation for non-highway projects back to *Greene County* and 1972: states may delegate EIS preparation to local agencies. The subsequent actions of these agencies — at least in projects not involving highways — appear to be unaffected by NEPA. In effect, *Greenspon* frees the federal government of the requirement that it independently evaluate the state-prepared EISs in certain circumstances.

¹⁷⁶ *Iowa Citizens*, 487 F.2d 849 (8th Cir. 1973).

amendment allowing delegation, courts permitting such delegation have received no further word from Congress as to the standards for delegation. Congress has remained silent, although the increased pervasiveness of delegation since 1975 has created greater danger of bias as well as of suppression of environmental concerns.

Sierra Club v. United States Army Corps of Engineers,¹⁷⁷ a case involving the proposed Westway Highway in New York City,¹⁷⁸ illustrates how these dangers have been realized and how courts may uncover them. This case involves a number of delegations, from the federal government to the state, from the state to a private party, and, finally, from one private party to another.¹⁷⁹ While *Sierra Club* reveals how excessive delegation insulates bias from discovery, and may prevent independent federal evaluation of the EIS, the case also demonstrates how a court may examine the record to determine the extent of state bias and independent federal evaluation. For this reason, *Sierra Club* is the most significant case involving EIS delegation since *Greene County* and *Iowa Citizens*.

The administrative record in *Sierra Club* is long and complex, but its details provide the best example of the way in which excessive delegation can warp decisionmaking and require the court's diligent attention to the record. The events leading to *Sierra Club* began in 1971, when New York City, New York State, and the Federal Highway Administration agreed to replace the southernmost portion of the city's decaying West Side Highway.¹⁸⁰ The highway eventually proposed as a result of this agreement was called Westway. Planning started in 1972, when New York State and New York City established an administrative entity called the West Side Highway Project ("the Project").¹⁸¹

Placed under the jurisdiction of the New York State Department of Transportation (NYSDOT)¹⁸² — an agency allowed to prepare an EIS under the terms of NEPA's amendment — the Project was "comprised almost entirely of outside consulting firms."¹⁸³ In 1974, two years after its formation, the Project issued a draft EIS outlining five alternatives to Westway and discussing the proposed highway's impact on Hudson River fisheries.¹⁸⁴ The Project's draft EIS, rep-

¹⁷⁷ *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983).

¹⁷⁸ *Id.* at 1016.

¹⁷⁹ *Id.* at 1017.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

resenting the efforts of various consulting firms, relied for its fisheries information on a 1973 biological survey conducted by one of its consulting firms.¹⁸⁵ Three years after the draft's release, on January 4, 1977, the Project issued its final EIS.¹⁸⁶ It recommended Westway's construction and was signed by both the NYSDOT and the FHWA.¹⁸⁷ On the same day, the final EIS appeared and the FHWA-approved funding for Westway.¹⁸⁸

Several months later, NYSDOT applied to the U.S. Army Corps of Engineers for a permit to approve a landfill of the Hudson River that Westway's construction would require.¹⁸⁹ Immediately after the Corps posted notice of the permit, the Fisheries Service, the Wildlife Service, and the Environmental Protection Agency (EPA) objected.¹⁹⁰ Their objections concerned the landfill's impact on fisheries; the Corps forwarded them to the Project and made no further reply.¹⁹¹ The Project responded by repeating the conclusions of its final EIS and calling the EPA "biased."¹⁹² In December, 1978, however, the EPA persuaded NYSDOT to conduct further studies of the region the landfill would affect.¹⁹³ The Project then commissioned an engineering firm to make a study.¹⁹⁴ By the end of 1979, the engineering firm's study had revealed significant numbers of fish in the area of the proposed landfill.¹⁹⁵

A draft report the firm issued in August, 1980 led to a meeting that month between the engineering firm, the Project, and the FHWA to discuss how to mitigate the landfill's potentially adverse impact on fish.¹⁹⁶ The Corps was not then present; it received the firm's final report in September, 1980.¹⁹⁷ Over the continuing objections of the Sierra Club — which had seen the firm's August 1980 draft¹⁹⁸ — and of the Fisheries Service, the Wildlife Service, and

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1018.

¹⁸⁷ *Id.* at 1019.

¹⁸⁸ *Id.* The decision to release the EIS on the same day the agency responsible for it decided to fund the project for which the statement was prepared recalls *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972), a case that involved similarly suspect timing. See *supra* note 83 and accompanying text.

¹⁸⁹ *Sierra Club*, 701 F.2d at 1019-20.

¹⁹⁰ *Id.* at 1021-22.

¹⁹¹ *Id.* at 1022.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1023.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

the EPA,¹⁹⁹ the Corps relied on the Project's final January 1977 EIS and issued the landfill permit on February 18, 1981.²⁰⁰ When the government agencies protesting the Corps' action decided not to appeal its decision, the Sierra Club filed a suit of its own in March, 1981.²⁰¹ *Sierra Club v. United States Army Corps of Engineers* resulted. The case confirms the danger of bias discussed in *Greene County*, and meaningfully applies the standard of independent federal evaluation seen in *Iowa Citizens*. Confronting the plaintiff's claim that the Corps was relying on a biased EIS, District Court Judge Thomas Griesa did not merely announce that delegation was allowed by NEPA without further inquiry into the review of the EIS the Corps sought to use. Rather, Judge Griesa scrutinized the administrative record before him more thoroughly than any previous judge in a delegation case.

After a sentence-by-sentence comparison of contemporaneous FHWA memos about the August, 1980 meeting between the FHWA, the Project, and the engineering firm studying fishery impact,²⁰² Judge Griesa found the testimony of the Project's representatives on the memos and their own ignorance of adverse fishery impact "entirely unconvincing."²⁰³ The Project, Judge Griesa found, "knew, or should have known, that they had no basis"²⁰⁴ for asserting that the landfill would have no adverse impact. He also examined memos exchanged between NYSDOT, the FHWA, and the Corps and concluded that the FHWA and NYSDOT "were instrumental in persuading the Corps to withhold fisheries information."²⁰⁵ The FHWA's communication with the Corps concerning the engineering firm report was so selective that Judge Griesa declared FHWA testimony about its contact with the Corps to be untrue and its statements to the Corps to be "simply fraudulent."²⁰⁶ Given this record, the district court struck down the Corps' attempt to rely on the EIS prepared

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1024.

²⁰¹ *Id.* *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983), was not the first case filed in opposition to Westway's construction. However, it has proceeded further than the two previous suits seeking to block the highway. See *Action for Rational Transit v. West Side Highway Project*, 517 F. Supp. 1342 (S.D.N.Y. 1981) and *Action for Rational Transit v. West Side Highway Project*, 536 F. Supp. 1225 (S.D.N.Y. 1982), *aff'd*, 699 F.2d 614 (2d Cir. 1983).

²⁰² *Sierra Club*, 541 F. Supp. 1367, 1375 (S.D.N.Y. 1982).

²⁰³ *Id.* at 1376.

²⁰⁴ *Id.* at 1370.

²⁰⁵ *Id.* at 1369.

²⁰⁶ *Id.* at 1379.

by the Project and ordered the Corps to prepare a supplemental EIS.²⁰⁷

On appeal, the Second Circuit found that NEPA's amendment did not permit the Corps' reliance because the amendment applied to the FHWA — a funding agency — and not to the Corps, a permitting agency.²⁰⁸ The circuit court, however, reversed the district court's order that the Corps prepare a supplemental EIS on both fishery and nonfishery issues raised by Westway and limited the Corps' statement to fisheries.²⁰⁹ Despite its partial reversal of the lower court, the Second Circuit upheld that court's close scrutiny of the administrative record. Based on the evidence that Judge Griesa had so thoroughly examined, the Second Circuit was able to state conclusively that there "was no evidence that FHWA made any independent evaluation whatever of the fisheries issues."²¹⁰ The court uncovered absolutely no proof that the FHWA had evaluated its decisions upon receiving the comments of other federal agencies; lacking that proof, the court could not find evidence of the federal review required by NEPA. Thus, while the district court was reversed on the scope of the EIS it ordered the Corps to prepare, the substance of its ruling was upheld: the circuit court found the federal review of the EIS by the FHWA to be insufficient and its use by the Corps to be improper.

The Project drafters in *Sierra Club* were so intent on constructing Westway that they disregarded, and then even suppressed, relevant environmental information. The EIS was thus full of the self-serving statements that the court in *Greene County*, over a decade earlier, predicted states might make if allowed to prepare an EIS completely. In at least one case, then, the fears of the *Greene County* court were realized.

Nevertheless, the holding in *Sierra Club* does not necessarily support a ban on state preparation of a final EIS. The case furthers considerably the attempt, begun in *Iowa Citizens*, to help courts evaluate the sufficiency of federal review of a state-prepared EIS. *Sierra Club* answers the question by pinpointing just how and when the federal agency and the state preparer obtained their information; it also explores how federal officials considered and responded to the comments they received once they circulated a state-prepared EIS.

²⁰⁷ *Id.* at 1382.

²⁰⁸ *Sierra Club*, 701 F.2d at 1038-39.

²⁰⁹ *Id.* at 1039.

²¹⁰ *Id.* at 1031.

In short, both the district and circuit courts in *Sierra Club* did not simply assert the sufficiency or insufficiency of federal review, and they did not simply accept evidence of meetings between federal and state officials as proof of the adequacy of federal review. Both courts supported their findings with the facts before them and were the first to explore how the requirement that the EIS be circulated for notice and comment could be used to test the sufficiency of federal review.²¹¹ *Sierra Club*, then, is a crucially important case in the law of EIS delegation, not because it devises a new standard of review — it does not — but because it is the very first case to apply existing standards in a meaningful way.

Sierra Club is the only case to apply meaningfully the NEPA amendment since Congress decided that EIS preparation could be delegated to the states, as long as independent federal evaluation followed. Yet it is not the only post-1975 advance in the judicial attempt to ensure that delegated EISs satisfy NEPA. Regulations now offer further guidance to courts seeking to detect bias and ensure that NEPA is satisfied. In 1978, the Council on Environmental Quality (CEQ) promulgated guidelines, now binding regulations, that attempt to describe agency responsibility, and require private contractors to file statements disavowing any interest in the project for which they prepare an EIS.²¹²

The potential of these regulations to guard against bias is great. Yet to date it has been realized only by two cases, perhaps because the regulations deal directly with federal agencies while their impact on state actions remains unclear.

*Sierra Club v. Sigler*²¹³ contains the fullest discussion yet of the CEQ regulations. It involved the U.S. Army Corps of Engineers' issuance of permits needed to authorize the construction of a deep-water port and crude oil distribution system.²¹⁴ Confronting the Corps' reliance on an EIS prepared by a financially-interested party, the court noted that "an agency may not delegate its public duties to private entities, . . . particularly private entities whose objectivity may be questioned on grounds of conflict of interest."²¹⁵ Though the court had declared the private firm's role in the EIS to be "particularly troubling in this case because the consulting firm also

²¹¹ *Sierra Club v. United States Army Corps of Engineers*, 541 F. Supp. 1367, 1369–70 (S.D.N.Y. 1982), 701 F.2d 1011, 1021–22 (2d Cir. 1983).

²¹² 40 C.F.R. § 1506.5(c) (1983).

²¹³ 695 F.2d 957 (5th Cir. 1983).

²¹⁴ *Id.* at 961–63.

²¹⁵ *Id.* at 963 n.3.

had a stake in the project which it was evaluating,"²¹⁶ it refused to rule on whether or not the Corps had improperly rubberstamped the firm's EIS or even to decide if a violation of the CEQ regulations had occurred.²¹⁷ This court was not, however, shirking the question: as an appellate court, it was not asked to decide the question, and therefore could not.²¹⁸

Regulations have not, however, uniformly constrained delegation. As early as 1974, the FHWA had promulgated regulations to satisfy NEPA's requirements but still allow consultants to prepare EISs as long as FHWA review followed.²¹⁹ These regulations even allowed financially-interested parties to prepare the EIS.²²⁰ Though these regulations were consistent with contemporary case law, NEPA's amendment raised the question of whether or not the regulations were valid insofar as they permitted EIS delegation to private parties. Confronted with precisely this question, the court in *Stop H-3 Association v. Lewis*²²¹ concluded that:

It appears from the legislative history of the 1975 amendment to NEPA (Public Law 94-83) that the section permitting delegation of EIS preparation to State agencies was added to resolve the split in case law which had developed. The issue of consultants was not addressed. It does not appear that Congress intended to prohibit the delegation of EIS preparation to private consultants. I conclude that the regulation is neither contrary to NEPA nor invalid.²²²

The court then answered the plaintiff's alternative argument — that, even if the FHWA regulation was valid, it did not allow delegation to a private party. The *Stop H-3* court found that the FHWA regu-

²¹⁶ *Id.*

²¹⁷ *Id.* It appears that the appellate court undoubtedly would have applied the CEQ regulation, *supra* note 212, to invalidate the delegation here, if the appellants had given it the opportunity. It is important to note this omission because *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983), serves as a warning that the issue of EIS delegation to private parties is not resolved despite the number of cases upholding private preparation of the EIS.

It is worth noting that the *Sigler* court cited *Sierra Club v. Lynn* in its argument against EIS delegation to private parties. See 695 F.2d at 963, n.3 (citing 502 F.2d 43 (5th Cir. 1974)) and, *supra* note 99.

²¹⁸ Though the *Sigler* court invalidated the EIS on other grounds, it is important to note here that the failure to cite the CEQ regulation could have lost the case for the plaintiffs.

The court in *Sigler* invalidated the final EIS because the statement did not consider environmental costs in the manner prescribed by NEPA and the CEQ's worst-case analysis. See *Sigler*, 695 F.2d at 975-83.

²¹⁹ 23 C.F.R. § 771.7 (1980).

²²⁰ *Stop H-3 Association v. Lewis*, 538 F.Supp. 149, 160 (D.C. Hawaii 1982).

²²¹ 538 F.Supp. 149 (D.C. Hawaii 1982).

²²² *Id.* at 160-61.

lation did permit such delegation.²²³ The plaintiff's final defeat came when the court accepted evidence of contact between the federal agency and the private party as proof of federal review.²²⁴ That move led the court to rule that the consultant's financial interest in the highway need not be disclosed in the EIS they had prepared. "It is sufficient," the *Stop H-3* court concluded, "that this interest was known to the agencies responsible for the EIS."²²⁵ The court did not address the obvious question as to how agencies that merely received the EIS for comment were to learn the circumstances of its preparation.

In *Stop H-3*, the court's treatment of final EIS preparation would stop federal evaluation of a delegated EIS once the delegating agency receives the draft EIS back from the agencies it circulated the statement to for comment. This ruling demonstrates the failure of courts to appreciate what *Sierra Club*²²⁶ reveals about delegation. In limiting the disclosure of a statement's private preparation to the draft EIS circulated among agencies, the *Stop H-3* court forces potential non-governmental environmental plaintiffs to rely on federal agencies to bring suit. In *Sierra Club*, the three federal agencies who initially fought the Corps' permit did not bring suit, despite knowledge of the inadequate evaluation that the privately-filed suit would later uncover.²²⁷ The refusal of federal agencies to intervene forced the *Sierra Club* to do so.²²⁸

The decision in *Stop H-3* offers no assurance that plaintiffs outside of government will possess the insiders' knowledge that the *Sierra Club* drew upon in its decision to file suit. In short, if courts follow *Stop H-3*, not all potential plaintiffs will learn of the possible bias that may affect them in a privately-prepared EIS. Yet *Sierra Club v. United States Army Corps of Engineers* demonstrates that suits by private plaintiffs may be necessary if NEPA's requirement that delegated statements receive independent federal evaluation is to be satisfied.

B. The Delegation of NEPA

The entire question of EIS delegation hinges upon which responsibilities NEPA imposes on the federal agency once that agency has

²²³ *Id.* at 161.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ 701 F.2d at 1024.

²²⁷ *Id.* See *supra* notes 200-01 and accompanying text.

²²⁸ *Id.*

delegated to a state the task of EIS preparation. Yet Congress has not simply allowed the delegation of EIS preparation to the states as long as federal review follows.²²⁹ Once the task of EIS preparation is delegated to a private party, some federal statutes free parts of the federal bureaucracy from following NEPA.²³⁰

The second kind of delegation discussed in post-1975 case law represents the type of federal law recodification that Senator Jackson opposed and Representative Aspinall endorsed. This delegation and its effects must be discussed here to explain cases where the results are incompatible with NEPA, even though the courts purport to satisfy the statute.

One year before amending NEPA, in legislation that apparently prompted little debate and received no mention in the Senate Report on NEPA's amendment, Congress passed the Housing and Community Development Act of 1974.²³¹ In *Monarch Chemical Works v. Exxon*,²³² the City of Omaha sought Department of Housing and Urban Development (HUD) funding that was made available under the Act for an industrial redevelopment project.²³³ The court reviewed an EIS prepared by the city after it had been delegated the authority by HUD.²³⁴ This delegation was statutory delegation *outside* of NEPA, a delegation in which the federal court reviews actions taken by state or municipal, not federal government. The two premier cases of such reviews are *Monarch Chemical*²³⁵ and *Brandon v. Pierce*.²³⁶

The Federal Housing and Community Development Act, enacted in 1974 and amended in 1977, allows federal EIS delegation "to applicants who assume all of the responsibilities for environmental review, decisionmaking, and action pursuant to such Act that would apply to the Secretary [of HUD] were he to undertake such projects

²²⁹ In legislation with effects beyond the scope of the EIS delegation discussed in this article, Congress has allowed federal agencies to delegate *all* of the agency's NEPA responsibilities to a private party.

²³⁰ See *Monarch Chemical Works, Inc. v. Thone*, 604 F.2d at 1085 n.2 (8th Cir. 1979) for an example.

²³¹ Federal Housing and Community Development Act of 1974, § 101 *et seq.*, 42 U.S.C. § 5301 *et seq.* (1982).

²³² *Monarch Chemical Works v. Exxon*, 452 F. Supp. 493 (D. Neb. 1978), preliminary injunction lifted, 466 F. Supp. 639 (D. Neb. 1979), *aff'd sub nom. Monarch Chemical Works v. Thone*, 604 F.2d 1083 (8th Cir. 1979).

²³³ *Monarch Chemical*, *supra* note 232, at 1085.

²³⁴ *Id.*

²³⁵ See *supra* note 232.

²³⁶ 725 F.2d 555 (10th Cir. 1984).

as Federal projects.”²³⁷ As long as the recipient of federal funds assumes the liabilities the federal agency might otherwise have,²³⁸ the delegation of EIS preparation is proper. Embracing such a complete transfer of responsibility — a transfer even the amended NEPA does not envision — the regulations HUD promulgated under the Housing and Community Development Act allowed the delegation of EIS preparation to a private party “regardless of the applicant’s technical expertise.”²³⁹

Under the Housing and Community Development Act, the *Monarch Chemical* court decided that “HUD is never required to receive a copy of an impact statement prior to a release of funds.”²⁴⁰ Although this conclusion represented a complete circumvention of NEPA, the court noted only that: “In contrast with the 1975 amendment to the National Policy [sic] Act itself, found at 42 U.S.C.A. § 4332(2)(D)(1977), HUD has the power to delegate environmental duties . . . while relinquishing all responsibility for the consequences.”²⁴¹

The acknowledgment of HUD’s complete circumvention of NEPA did not lead the *Monarch Chemical* court to a defense of the statute. Beyond this single statement, it refrained from any further comment on the recodification of federal law that allowed the circumvention. On appeal, the plaintiffs dropped all arguments of invalid delegation, and the Eighth Circuit affirmed.²⁴²

The reluctance of the *Monarch Chemical* court to address the circumvention of NEPA through recodification continues. In another, more recent case, *Brandon v. Pierce*,²⁴³ the court upheld a result that is hard to reconcile with NEPA’s aim of ensuring that government consider the environmental consequences of its actions. In *Brandon*, the court confronted a private firm’s preparation of an “Environmental Assessment” done under the Federal Housing and Community Development Act of 1974, as part of the Department of Housing and Urban Development’s complete delegation of its NEPA responsibilities to the City of Stilwell, Oklahoma.²⁴⁴ In *Brandon*, the delegation of the Environmental Assessment to a private engineer-

²³⁷ *Monarch Chemical*, 466 F. Supp. at 645 (quoting, in part, 42 U.S.C. § 5304(h)(1) (1977)).

²³⁸ *Id.*

²³⁹ *Id.* at 646.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See *supra* note 232.

²⁴³ *Brandon*, *supra* note 237, at 557–58.

²⁴⁴ *Id.* at 563–64.

ing firm occurred under a contract that specified the firm would be paid only if the project for which it was preparing the Assessment was approved.²⁴⁵ Despite this contingent payment, and the temptation for self-serving statements of the kind the *Greene County* court had condemned, the *Brandon* court upheld the delegation of the Assessment, treating it as an EIS:

It is true that the firm had not received compensation for their services on the Environmental Assessment, and such work was treated as part of the overall engineering services, . . . which could arguably be said to have influenced their work. However, it was the City, not the engineering firm, which had the responsibility of making the negative finding on an EIS and this responsibility was carried out by the City.²⁴⁶

In short, simply because the City had retained the right to refuse the EIS, its delegation of the statement was proper. The City's imposition of conditions that virtually guaranteed biased preparation was not even questioned by the court.

The requirement for independent federal evaluation found in the amendment to NEPA, unaided by any requirement that the EIS record display such evaluation, becomes in *Brandon* a hollow formality. Though the CEQ Council during the Carter Administration disapproved HUD environmental review procedures — procedures the *Brandons* claimed were “an unlawful delegation of duties”²⁴⁷ — during the early years of the Reagan Administration the CEQ Council reversed its position and approved the HUD regulations.²⁴⁸ The congressional approach to delegation has similarly broadened delegatory powers: in 1979, Congress specifically amended the Federal Housing and Community Development Act of 1974 to broaden HUD's delegation authority.²⁴⁹ Faced with statutory and regulatory approval of standards that directly contradict the NEPA amendment, the *Brandon* court ruled that the Federal Housing and Community Development Act “makes [it] clear that Congress intended to transfer NEPA responsibilities from the federal agency to the local grant applicants.”²⁵⁰

The increasing delegation of environmental responsibilities to areas outside NEPA's reach, and the failure of the NEPA amend-

²⁴⁵ *Id.* at 564.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 559.

²⁴⁸ *Id.* at 560–61 n.3.

²⁴⁹ *Id.* at 560 n.2.

²⁵⁰ *Id.* at 560.

ment to codify workable standards for judicial review of EIS delegation under NEPA, have combined to create a situation that returns the delegation question — for certain projects, at least — to the early 1970s. Now, any litigant challenging an EIS delegation must ensure that the federal statute under which the questioned agency claims to act does not sanction a wholesale delegation of NEPA responsibilities. No court to date has struck down the validity of such a delegation.

VII. RECOMMENDATIONS FOR PROPER EIS DELEGATION

The current law of delegation reflects a multitude of contradictions. Though CEQ regulations ban conflicts of interest,²⁵¹ payment for a privately-prepared EIS is allowed to be contingent upon approval of the very project for which the EIS is prepared.²⁵² Despite congressional statements urging delegation to competent personnel,²⁵³ and despite federal²⁵⁴ and state²⁵⁵ protests that they lack the staff competent to prepare EISs, no delegation statute or regulation conditions delegation on a federal determination that the state or private party possess resources sufficient to prepare the EIS. Regulation has not sought to specify the number or sorts of personnel needed to prepare the statement. The degree to which states may delegate EIS preparation to either private parties or to "administrative entities" remains unaddressed.

Against this background, the following recommendations encompass both statutory and regulatory changes aimed at reducing bias and ensuring adequate independent federal evaluation. Adoption of these changes would clarify the judicial evaluation of EIS delegation by providing to courts sufficient standards for detecting the abuses of delegation seen in *Sierra Club*.²⁵⁶

1. Ban Private Preparation of the EIS

The general mandate NEPA imposes on the federal bureaucracy implicitly assumes that, despite their varied missions, federal agencies retain the objectivity needed to make a good-faith consideration of environmental concerns. If federal agencies may be presumed to

²⁵¹ See *supra* notes 44–45 and accompanying text.

²⁵² See *supra* notes 245–46 and accompanying text.

²⁵³ See *supra* notes 157–58 and accompanying text.

²⁵⁴ See *supra* note 132 and accompanying text.

²⁵⁵ See *supra* note 127.

²⁵⁶ 541 F. Supp. 1367 (S.D.N.Y. 1982), *partially aff'd, partially vacated*, 701 F.2d 1011 (2d Cir. 1983).

be capable of such evaluation, it does seem hypocritical to conclude, as did the court in *Conservation Society*, that states are incapable of preparing an EIS objectively because their agencies also face legislative mandates.²⁵⁷ State preparation of an EIS cannot be presumed biased without also presuming that the aims of NEPA are impossible to meet. Federal agencies clearly possess mandates just as imperative as those of the states. With both federal and state agencies, NEPA is now a statute that imposes a mandate of environmental concern on agencies *in addition* to the regulatory mandate that created the agency.

The same rationale cannot be applied to the private preparation of an EIS under NEPA. The delegation of EIS preparation to private parties divides responsibility for an EIS along fundamentally different lines than does federal-state delegation. Where the latter simply divides delegation between different governments, the former divides delegation between the public and private sectors. This division leaves courts powerless under NEPA to affect the conduct of private parties: NEPA is a statute designed to ensure that government, not the private sector, is properly concerned for the environment.

Failure to remember that NEPA places responsibilities on government leads to cases, like *Brandon*,²⁵⁸ which pervert the entire purpose of the statute. Allowing the government to "satisfy" NEPA by contractually making payment for a delegated EIS contingent on approving the very project for which the statement is prepared misses the point of the statute. At the very least, courts ought to refuse, as a matter of law, to allow such contractual conditions to attach to the delegation of an EIS. Courts that permit an agency to delegate an EIS under conditions that assure bias, have not considered NEPA to be anything more than an environmental protection statute. However vague the statute is — and experience has shown the statute to be an unusually vague one — NEPA at least specifies whose conduct the courts must examine. It points to the government. In light of this mandate, there is no valid role for private EIS preparation. NEPA should be amended to ban the delegation of EIS preparation to private parties.

2. Regulate the Preparation of EISs by Local Agencies

NEPA's amendment provides that it "does not affect the legal sufficiency of statements prepared by State agencies with less than

²⁵⁷ See *supra* notes 109, 115–16 and accompanying text.

²⁵⁸ 725 F.2d 555 (10th Cir. 1984).

statewide jurisdiction.”²⁵⁹ The amendment does not, however, outline any standards for judicial decision about the legal sufficiency of such statements. The creation of a local agency, such as the Project in *Sierra Club*,²⁶⁰ demonstrates the need for states to remain flexible in creating administrative entities to handle the jobs encountered in complying with federal grants. Yet the conduct of agencies like the Project²⁶¹ demonstrates the need to police such agencies. If the job of EIS preparation is not to be endlessly delegated and passed throughout the private sector, limits must be placed on the way in which local agencies prepare the EIS.

The CEQ should promulgate regulations forbidding the use of private parties by local agencies preparing the EIS. In effect, states ought not to be allowed to satisfy NEPA by creating “administrative entities” that are actually groups of private consultants. NEPA demands adequate governmental consideration of environmental impact, and, if private EIS preparation is incompatible with NEPA, government should not aggravate the problem of private preparation by creating quasi-public entities such as the Project.

3. Require Greater Documentation of Federal Evaluation of Delegated EISs

Existing CEQ regulations offer the courts standards against which to judge the sufficiency of federal review through the use of the note and comment process.²⁶² The CEQ requires the federal agency filing the EIS to state why it did not follow suggestions received from other federal agencies following circulation of a draft. This regulation could be used to protect against the failure of the filing agency to evaluate state-prepared EISs. Courts apparently have not realized this potential. Even in *Sierra Club*, a case in which the commenting agency noticed and protested an environmental impact the filing agency was ignoring,²⁶³ this regulation was not cited. When courts have cited this particular CEQ regulation,²⁶⁴ they have done so in connection with private claims that the federal agency did not properly consider alternatives in the final EIS. The regulation has

²⁵⁹ National Environmental Policy Act of 1969, § 102(2)(D), 42 U.S.C. § 4332(2)(D) (1982).

²⁶⁰ See *supra* notes 181–84 and accompanying text.

²⁶¹ See *supra* notes 202–06 and accompanying text.

²⁶² 40 C.F.R. § 1503.4 (1984).

²⁶³ See *supra* notes 196–201 and accompanying text.

²⁶⁴ *Friends of the River v. Federal Energy Regulatory Commission*, 720 F.2d 93, 120 (D.C. Cir. 1983); *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 437 n.9 (5th Cir. 1981).

not yet been used to ensure that the federal agency filing an EIS consider every suggestion raised by agencies commenting on the draft. This use of the regulation would accomplish NEPA's aim of ensuring adequate federal evaluation of environmental impact.

The CEQ should promulgate regulations requiring more detailed documentation of federal guidance when state officials prepare a delegated EIS. Federal agencies delegating EIS preparation to the states should be required to keep a complete record of every discussion between the agency and the state concerning the statement. This record should indicate what was discussed with the state on any given date. States should be required to keep a similar record, and the federal and state records should be kept independently, without comparison of their contents. It was the comparison of the federal agency record with the state's record in *Sierra Club*²⁶⁵ that helped to uncover the suppression of environmental impact against which delegation must protect.

Finally, courts should use the Code of Federal Regulations, at volume 40, section 1502.17, to ensure that the reader of a delegated EIS knows precisely who prepared it. Though the *Stop H-3*²⁶⁶ court's decision that a final EIS need not list the name of a private contributor seems to violate the regulation, it is important to note that the regulation currently requires only the names of the persons "primarily responsible for preparing the EIS."²⁶⁷ Lest courts begin to gauge the significance of any one contributor to the EIS, it is preferable to drop the "primarily" requirement from the regulation, and to list everyone involved in the statement's preparation.

VIII. CONCLUSION

NEPA was drafted to ensure that the federal government consider the environmental impact of its actions. Courts initially disagreed over the extent of federal EIS preparation needed to satisfy NEPA, but since NEPA's passage, there has been general agreement that the task of EIS preparation may be divided between state and federal government. Disagreement over how to divide the federal and state roles in satisfying the EIS requirement ended in 1975, when Congress amended NEPA to allow complete state preparation of an EIS so long as it is followed by independent federal evaluation.

²⁶⁵ See *supra* notes 202-04 and accompanying text.

²⁶⁶ *Stop H-3 Association v. Lewis*, 538 F. Supp. 149 (D. Hawaii 1982).

²⁶⁷ 40 C.F.R. § 1502.17 (1985).

Thus while the law was changed to permit delegation, Congress did not provide the courts with additional standards for policing it.

As a result, courts have continued to confront the question of the sufficiency of federal evaluation. The resulting confusion has allowed what may be improper delegation. To ensure proper delegation, and to ensure judicial detection of improper delegation, it is necessary for the courts to enforce the CEQ regulations. When courts consider these regulations, as well as further CEQ regulations, then there will be clearer standards for determining the sufficiency of federal review. Passage of NEPA's 1975 amendment did not resolve the questions raised by delegation. In the legislative arena, much remains to be done, and in the future, the problem promises to grow more pressing.

However weakened NEPA may be by confused EIS delegation standards and the statutory circumvention of its aims, the issues raised by the delegation of the responsibilities it imposes on the federal government extend beyond the statute and beyond environmental law. The ability of the courts to enforce the law is related to their ability to supervise delegation. As the judicial treatment of EIS delegation demonstrates, when courts are left without standards, they are all too often left to assert, rather than to demonstrate, the validity of their findings. The responsibilities of the courts — as well as those of Congress — go unmet while the federal bureaucracy carries out the very tasks the courts and Congress are supposed to supervise. A recent D.C. Circuit case,²⁶⁸ one involving neither NEPA nor the environment, addressed the future of this issue:

As attention to this area of our law grows, it refocuses thought on one of the rationales against excessive delegation: the harm done thereby to principles of political accountability. Such harm is doubled in degree in the context of a transfer of authority from Congress to an agency and then from agency to private individuals. The vitality of challenges to the former type of transfer is suspect, but to the latter, unquestionable.²⁶⁹

On this continued vitality more than merely the survival of NEPA may depend.

²⁶⁸ *National Association of Regulatory Utility Commissioners v. F.C.C.*, 737 F.2d 1095 (D.C. Cir. 1984) *cert. denied*, ___U.S. ___, 105 S. Ct. 1224 (1985).

²⁶⁹ *Id.* at 1143 n.41.